TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 122.

HENRY ARNOLD RICHARDSON, AS TRUSTEE IN BANKRUPTCY OF J. FRANCIS BROWN, PETITIONER,

vs.

JOHN M. SHAW AND ALEXANDER DAVIDSON.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI FILED OCTOBER 5, 1907.
CERTIORARI AND RETURN FILED OCTOBER 30, 1907.

(20,398.)

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a United States Circuit Court of Appeals for the Second Circuit.

HENRY ARNOLD RICHARDSON, as Trustee, &c., Plaintiff in Error (Plaintiff below),

vs.

JOHN M. SHAW and ALEXANDER DAVIDSON, Defendants in Error (Defendants below),

Certified Copy.

Transcript of Record.

Error to the District Court of the United States for the Southern District of New York.

Printed under the direction of the Clerk.

[Stamped:] United States Circuit Court of Appeals, Second circuit. Filed Jan. 17 1906. William Parkin, Clerk.

1 United States District Court, Southern District of New York.

HENRY ARNOLD RICHARDSON, Trustee, &c.,

vs.

JOHN M. SHAW and ALEXANDER DAVIDSON.

Statement.

1904.
Sept. 13. Case begun.
1905.
Feby. 8. Cause tried before Hon. Geo. C. Holt, *D. J.*, and a Jury.
" " Cause decided. Verdict for defendants by direction of the Court.
" 14. Judgment filed and docketed.
Mch. 8. Writ of error allowed.
" " Plaintiff's assignment of errors filed.
Sept. 5. Bill of exceptions filed.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the judges of the district court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the District Court, before you, or some of you, between Henry Arnold Richardson, as Trustee in bankruptcy of J. Francis Brown, plaintiff, and John M. Shaw and Alexander Davidson, defendants, a manifest error hath happened,

to the great damage of the said Henry Arnold Richardson, Trustee in Bankruptcy of J. J. Francis Brown, as is said and appears by his complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Judges of the United States Circuit Court of Appeals for the Second Circuit, at the City of New York, together with this writ, so that you have the same at the said place, before the Judges aforesaid, on the 7th day of April, 1905, that the record and proceedings aforesaid being inspected, the said Judges of the United States Circuit Court of Appeals for the Second Circuit may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

3 Witness, the Honorable Geo. B. Adams and Honorable Geo. C. Holt, Judges of the District Court of the United States, Southern District of New York, this 8th day of March, in the year of our Lord one thousand nine hundred and five and of the Independence of the United States the one hundred and twenty-ninth.

THOS. ALEXANDER,
Clerk of the District — of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

GEO. C. HOLT, *U. S. District Judge.*

UNITED STATES OF AMERICA, *Southern District of New York, ss:*

I, Thomas Alexander, Clerk of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from 2 to 63, inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of Henry Arnold Richardson, Trustee in Bankruptcy, &c., plaintiff in error, against John M. Shaw and Alexander Davidson, defendants in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 25th day of September, in the year of our Lord one thousand nine hundred and five

4 and of the Independence of the United States the one hundred and thirtieth.

[L. S.] THOS. ALEXANDER, *Clerk.*

(Endorsed:) The U. S. Circuit Court of Appeals for the Second Circuit.—Henry Arnold Richardson, Trustee in Bankruptcy of J. Francis Brown, Plaintiff in Error, *vs.* John M. Shaw and Alexander

Davidson, Defendants in Error.—Writ of Error.—Taylor More, Attorney for Plaintiff in Error, 30 Broad Street, New York City.—Due service of a copy of the within Writ of Error is hereby admitted this 9th day of March, 1905.—Campbell & La Far, Attorneys for Defendant in Error.

United States District Court for the Southern District of New York.

HENRY ARNOLD RICHARDSON, as Trustee, &c.,
against
JOHN M. SHAW and ALEXANDER DAVIDSON.

To the above-named Defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney
5 within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable George B. Adams and Honorable George C. Holt, Judges of the District Court of the United States for the Southern District of New York, at the City of New York, this 13th day of September, in the year one thousand nine hundred and four.

THOS. ALEXANDER, *Clerk.*

TAYLOR MORE,
Plaintiff's Attorney.

Office and Post Office Address, 115 Broadway, Borough of Manhattan, New York City.

(Endorsed:) United States District Court, Southern District of New York.—Henry Arnold Richardson, as Trustee, &c., *vs.* John M. Shaw & ano.—Summons.—Taylor More, Plaintiff's Att'y; Office, No. 115 B'way.—Service of the summons herein upon the Defts. within named on Sept. 13th, '04, is hereby admitted.—Filed Sept. 15, '04.—Campbell & La Far, Atty's for Defts.

6 UNITED STATES OF AMERICA:

United States District Court, Southern District of New York.

HENRY ARNOLD RICHARDSON, as Trustee in Bankruptcy of J. Francis Brown,
vs.
JOHN M. SHAW and ALEXANDER DAVIDSON.

The plaintiff complains of the defendants and alleges as follows:

First cause of action:

1st. That on the 5th day of October, 1903, in a proceeding in bankruptcy then pending in the United States District Court for the

District of Massachusetts, the above-named J. Francis Brown was duly adjudged to be a bankrupt, and thereafter at a duly convened meeting of the creditors this plaintiff was duly elected trustee in bankruptcy for the creditors of said Brown, and thereafter bond for the faithful discharge of his duties as said Trustee was duly fixed by the said Court at the sum of two thousand (2,000) dollars, and thereupon the plaintiff duly executed said bond with sufficient surety, which bond was duly approved by said Court as to
7 form and sufficiency, and thereupon the plaintiff entered upon the discharge of his duties as such Trustee and has remained such Trustee to the present time.

2d. (Upon information and belief.) That said J. Francis Brown, being insolvent within four months before the filing of the petition in said proceedings in which he was so adjudged a bankrupt, to wit, on or about June 24th, 1903, made a transfer of certain of his property, to wit, the sum of five thousand (5,000) dollars, to the defendants herein, who then were copartners in the City of New York, doing business as bankers and brokers, and who then were creditors of said Brown, the effect of which transfer will be to enable said defendants as such creditors to obtain a greater percentage of their debt than any other of the creditors of said Brown in the same class.

3d. (Upon information and belief.) That the said transfer was made to one Royal B. Young, the agent of said defendants acting thereas, and said Royal B. Young then had at that time reasonable cause to believe that it was intended thereby to give a preference to said defendants.

4th. (Upon information and belief.) That said defendants so receiving said preference had at that time reasonable cause to believe that it was intended thereby to give a preference.

5th. (Upon information and belief.) The plaintiff has duly demanded from said defendants the payment to him of said five thousand (5,000) dollars, but the same has not been paid.

8 Second cause of action:

Repeating the allegations in paragraph number one herein and making the same a part hereof the plaintiff further alleges:

6th. That on or about the 26th day of June, 1903, there was an accounting between the said defendants and said Brown of various dealing between them in which it was found that said defendants owed the said Brown the sum of thirty-four thousand nine hundred and nineteen dollars and sixty-two cents ($34,919.62) upon the payment of which said Brown was obligated to deliver to them certain securities or in default thereof to pay to them the amount of their then market value, to wit, the sum as they ascertained upon said accounting of forty-five thousand five hundred and eighty-three dollars and seventy-five cents ($45,583.75), and thereupon said defendants paid to said Brown said sum of thirty-four thousand nine hundred and nineteen dollars and sixty-two cents ($34,919.62), and said Brown then delivered to said defendants said securities, and the effect of such transfer will be to enable the said defendants as

such creditors to obtain a greater percentage of their debt than any other creditors of said Brown of the same class.

7th. (Upon information and belief.) That said transfer of said stocks and securities made by said Brown as set forth in the last preceding paragraph was made to said Royal B. Young, the agent of said defendants acting therein, and said Royal B. Young then had at that time reasonable cause to believe that it was intended thereby to give a preference to said defendants.

8th. (Upon information and belief.) That said defendants so receiving said preference then had at that time reasonable
9 cause to believe that it was intended thereby to give a preference.

9th. (Upon information and belief.) That the plaintiff has duly demanded the payment to him of said sum of ten thousand six hundred and sixty-four dollars and thirteen cents ($10,664.13), that sum being the excess of the market value of the stocks and securities owed and transferred by the said Brown as aforesaid, and the sum owed and paid to him by the defendants as aforesaid, but the same has not been paid.

Wherefore, the plaintiff prays judgment against said defendants for the sum of fifteen thousand six hundred and sixty-four dollars and thirteen cents ($15,664.13), with interest on five thousand dollars ($5,000) thereof from June 24th, 1903, and on ten thousand six hundred and sixty-four dollars and thirteen cents ($10,664.13) thereof from June 26th, 1903, besides costs.

TAYLOR MORE, *Pff's Att'y.*

JOHN BROOKS LEAVITT, *Of Counsel.*

BOSTON, *August* 30, 1904.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Personally appeared before me Henry A. Richardson, Trustee, and made oath that the allegations in the complaint by him subscribed so far as they are not made upon information and belief are true so far as they are made upon information and belief he believes them to be true.

[SEAL.] ALFRED W. PUTNAM,
Notary Public.

10 UNITED STATES OF AMERICA:

United States District Court, Southern District of New York.

HENRY ARNOLD RICHARDSON, as Trustee in Bankruptcy of J. Francis Brown, Plaintiff,
against
JOHN M. SHAW and ALEXANDER DAVIDSON, Defendants.

The defendants, answering the complaint of the plaintiff herein by Campbell & La Far, their attorneys, respectfully show to this Court:

First. They deny any knowledge or information sufficient to form a belief as to the allegations set out in paragraph (1) as the first cause of action.

Second. For answer to paragraph (2) of the first cause of action they deny that hey have any knowledge or information sufficient to form a belief concerning the affairs of J. Francis Brown four months prior to filing the petition in which he was adjudged a bankrupt, and for the purpose of requiring proof thereon they deny the same.

Third. They admit that on or about the 24th day of June, 1903, the firm of J. Francis Brown & Company paid to these de-
11 fendants the sum of five thousand ($5,000) dollars, but they deny that the same was paid for the account of J. Francis Brown & Company or for the account of J. Francis Brown.

Fourth. For answer to the third paragraph of the first cause of action these defendants deny each and every allegation therein contained.

Fifth. For answer to the fourth paragraph of the first cause of action these defendants deny each and every allegation therein contained.

Sixth. For answer to the fifth paragraph of the first cause of action these defendants admit that the plaintiff has demanded of them the payment of the sum of five thousand ($5,000) dollars and that they refused to pay the same.

The defendants, answering the second cause of action, respectfully show to this Court:

Seventh. These defendants deny each and every allegation contained in the sixth paragraph of the complaint. They further deny that on the 26th day of June, 1903, J. Francis Brown & Company or J. Francis Brown paid to them any sum whatever, or that J. Francis Brown & Company or J. Francis Brown delivered to them any securities.

Eighth. The defendants deny each and every allegation contained in paragraph seven of the second cause of action.

Ninth. The defendants deny each and every allegation contained in paragraph eight of the second cause of action.

Tenth. For answer to the allegations contained in the ninth para-
graph of the second cause of action the defendants admit
12 that the plaintiff has demanded of them the payment of the sum of ten thousand six hundred and sixty-four and 13/100 ($10,664.13) dollars, but deny that J. Francis Brown & Company or J. Francis Brown transferred to them any securities or stocks whatsoever.

Eleventh. The defendants deny each and every allegation contained in the complaint of the plaintiff except as herein specifically admitted.

Wherefore, these defendants demand judgment dismissing the complaint, with costs.

CAMPBELL & LA FAR,
Attorneys for Defendants, 30 Broad Street, New York City.

STATE OF NEW YORK, *County of New York, ss:*

John M. Shaw, being duly sworn, deposes and says that he is one of the defendants in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

JOHN M. SHAW.

Sworn to before me this 21st day of October, 1904.

WILLIAM J. CANARY,
Commissioner of Deeds, New York City.

(Endorsed:) Copy Pleadings.

13 United States District Court, Southern District of New York.

HENRY ARNOLD RICHARDSON, as Trustee in Bankruptcy of J. Francis Brown, Plaintiff,
against
JOHN M. SHAW and ALEXANDER DAVIDSON, Defendants.

The following bill of exceptions is hereby agreed upon between counsel for the plaintiff and the defendants, and its settlement consented to.

Dated August 2d, 1905.

TAYLOR MOORE,
Attorney for the Plaintiff.
CAMPBELL & LA FAR,
Attorneys for the Defendants.

14 United States District Court, Southern District of New York.

HENRY ARNOLD RICHARDSON, as Trustee in Bankruptcy of J. Francis Brown, Plaintiff,
against
JOHN M. SHAW and ALEXANDER DAVIDSON, Defendants.

Bill of Exceptions.

This action came on for trial before the Honorable George C. Holt, District Judge, and a jury, on February 8th, 1905.

Appearances.

John Brooks Leavitt, Esq., for Plaintiff.
Messrs. Maurice Untermyer, Arthur B. La Far and Abraham Benedict, for Defendants.

Mr. BENEDICT: Before the jury is empaneled, I object, on behalf of the defendants, to a trial by jury, upon the ground that this cause is of equitable cognizance.

Objection overruled. Exception by defendants.

The plaintiff's counsel, to maintain the issues on his part, read in evidence certain admissions made by the defendants, as follows:

15 1st. That defendants admit the allegations in the first paragraph of the first cause of action.

2d. That J. Francis Brown was on June 25th, 1903, and had been for the two preceding months, insolvent, within the meaning of the Bankrupt Law.

3d. That among the creditors of said Brown there was on said day a number of general creditors upon transactions in purchase and sale of stocks by said Brown as broker, similar to the transactions in purchase and sale of stocks by said Brown as broker for the defendants.

4th. That in said transactions in stocks between said Brown and defendants, Royal B. Young acted as attorney in fact of the defendants, and as such made the settlement in their behalf which is the subject of inquiry herein.

"In making the foregoing stipulation it is expressly understood that the defendants deny that they or their attorney, Royal B. Young, or any person acting in their behalf, had knowledge or reasonable cause to believe that at the times above stated the firm of J. Francis Brown & Co. or J. Francis Brown was insolvent."

Plaintiff's counsel then read in evidence the deposition of LEWIS C. BENTON, taken pursuant to notice before Stephen H. Tyng, Notary Public, at Boston, Massachusetts, on December 16th, 1904.

On his direct-examination the witness testified: That he resided in Wilmington, Mass.; was clerk for J. Francis Brown & Company for three years down to the failure on June 25th, 1903, Hooker Day, a holiday so-called because of the unveiling of the

16 statue at the State House; knew Royal B. Young; had a conversation with him on Hooker Day; he had called witness up on the telephone; the witness responded; recognized Young's voice; witness went to his office and Young said that he wanted to see Mr. Fletcher at once; that Fletcher had ruined the concern of J. Francis Brown & Company; witness said it was a lie and went out of the office.

On his cross-examination the witness testified: That J. Francis Brown did fail on June 26th; that on Hooker Day he went, at Fletcher's request, to see Albert Brown, of the firm of Brown, Reilly & Company, and that he promised to give his note for $5,000, to be turned over to Brown, Reilly & Company if they would help Francis Brown, and that he did give his note for that amount to the order of J. Francis Brown & Company, which was turned over to Brown, Reilly & Company.

On his redirect the witness stated: That at the time he had an account with J. Francis Brown & Company which was claimed to be "under water," that is, that he owed Brown & Company money on a purchase and sale account for him by Brown as broker, as to which he said that he did not know that he was so indebted; he was

willing to give his note to help Francis Brown, leaving the question of his indebtedness to be adjusted afterwards.

Plaintiff's counsel then read in evidence the deposition of CHARLES H. ROLLINS, taken at the same time and place as that of the preceding witness.

On his direct-examination the witness testified: That he lived at 497 Commonwealth avenue, Boston; in June, 1903, was in employ of J. Francis Brown & Company; looked after customers, outside matters, correspondence, etc.; Henry C. Young was manager;
17 he went away Wednesday, June 17th, a holiday; office kept open because it was not a holiday in New York; witness went to luncheon about two o'clock; got back 2:30; Mr. Young not there; witness got a telephone call from his house in Roxbury in the afternoon, saying he was not feeling well; talked with Young over the telephone during the evening; witness went to New York at midnight; returned Friday; on coming to the office found Young not there and had not been there since Wednesday; on Sunday, the 21st, Fletcher and witness went to the office and worked there; Sunday morning witness called up H. C. Young to see how he was, as he had done every morning and evening, and talked with Mr. Royal B. Young; knew his voice and was positive it was Mr. Royal B. Young's voice, as one can be when talking over the 'phone; witness was at his own house when telephoning and telephoned to Wilmington, Mr. Henry C. Young's country place; the conversation with Royal B. Young was a general conversation on the affairs of J. Francis Brown & Company; could not remember every word for word; could only give a general idea; the substance of the conversation was on the subject of the trouble in the office of J. Francis Brown & Company; Mr. Royal B. Young blamed Lawrence Fletcher for the trouble, and stated that he knew more about it than witness did; that if witness would meet him he would give witness some facts; witness afterwards met Royal B. Young that week by appointment in the corridor of the post office, where practically the same conversation was had between them as over the 'phone; Royal B. Young said that Lawrence Fletcher had ruined the concern entirely and that he knew it for a fact and that he was informed as to what was going on; did not say how he was informed; witness did not ask him.

18 On his cross-examination the witness stated: That after June 17th, 1903, he learned Henry C. Young was ill; at the conversation with Royal B. Young, when the latter said that he knew more about the affairs than witness, the witness said very little; Young did the talking.

Plaintiff's counsel then read in evidence the deposition of PHILIP O. WOODBURY, taken at the same time and place as that of the preceding witness.

The witness testified that he was clerk of the Boston Stock Exchange and had in his possession the records of the prices for sales of stock on that exchange, and then gave, by reference to the official

sheet of sales at that exchange, June 26th, 1903, the following quotations for stocks sold and quoted on that day:

Amer. Telephone sold round lots 141 to 140 closed, 140 bid, 140¼ asked.

Am. Sugar Ref. Com. round lots 119 to 119⅜ closed, 118½ bid, 119½ asked.

Am. Sugar Ref. Pf'd. round lots 119½ to 119⅞ closed, 119⅝ bid, 120 asked.

Am. Woolen Pf'd. sold round lots 70 to 74⅞ closed, 74¼ bid, 75 asked.

New York N. H. & H. small lots 197 closed, 195 bid, 197 asked.

Mass. Elec. Common round lots 26½ closed, 26 bid, 26¾ asked.

U. S. Steel Common round lots 29½ closed, 29⅜ bid, 29⅝ asked.

Amalgamated Copper round lots 53½ to 54⅜ closed, 54¼ bid, 54⅜ asked.

Dominion Iron & Steel round lots 16½ to 17¾ closed, 17⅜ bid, 17¾ asked.

Adventure Copper Mining round lots 5 closed, 5 bid, 5¼ asked.

Allouez Copper Mining round lots 6 closed, 5¾ bid, 6 asked.

19 Copper Range Com. round lots 53½ to 53¾ closed, 53½ bid, 53¾ asked.

Elm River Com. Mining round no sale, sold June 27 at 3. June 26, 3 bid, 3¼ asked.

Old Dominion Com. no sale, sold June 29 at 13½ closed, 13 bid, 13¾ asked.

Shannon Copper sold round lots 11½ closed, 11½ bid, 12 asked.

Trinity Copper sold round lots 6 to 5½ closed, 5¾ bid, 6¼ asked.

United States Mining round lots 21½ to 21¾ closed, 21½ bid, 21¾ asked.

Winona Copper round lots 8¾ closed, 8¾ bid, 9 asked.

Defendants' counsel then read in evidence his cross-examination.

Plaintiff's counsel then offered in evidence reports of certain adjudicated cases in Massachusetts, to wit:

Wood *v.* Hays, 15 Gray, 375.
Pell *v.* Loud, 105 Mass., 41.
Weston *v.* Jordon, 168 Mass., 401.
In re Swift, 5 Am. Bkcy. Rep., 374.
In re Swift, 7 Am. Bkcy. Rep., 374.

Same received, and by agreement they will be referred to in the printed reports as if given here in full.

Plaintiff's counsel then called LAWRENCE B. FLETCHER, who, being duly sworn as a witness on behalf of the plaintiff, testified as follows:

Live in Brookline, Mass.; in 1903 was employed by J. Francis Brown & Company as clerk, J. Francis Brown doing business under the name of J. Francis Brown & Company, stock broker, buying and selling stocks; his general manager was H. C. Young; Royal B. Young was his brother; know of transactions between Shaw

20 & Company and J. Francis Brown; they were had from February, 1903, until Brown made assignment, June 27th,

1903; Brown bought and sold stocks for Shaw & Company upon orders of R. B. Young, who had an office in Boston as stock broker; Shaw & Company did business in New York City, general stock brokers. Am acquainted with the method of transacting business between Shaw & Company and J. Francis Brown; our office, 15 Congress street, Boston; Shaw & Company had quite an account with us; were carrying a good many stocks, buying and selling; had a liberal margin, keeping a 10% margin on their stocks; paid cash as margin from time to time, beginning in February; Brown & Company sent them money at times; the stocks were figured at the market value every day, that is, the going prices at 10 o'clock in the morning, at 12 o'clock or 3 o'clock, whenever the slip came in; the account was carried on the books as R. B. Young, attorney; statements of the account were rendered to Young.

Upon call of the plaintiff's counsel the defendant produced and the plaintiff's counsel thereupon offered in evidence a statement dated May 11th, 1903.

Same received, marked Plaintiff's Exh. No. 1. (Same to be annexed.)

Also statement dated May 13th, 1903.

Same received, marked Exhibit No. 2. (Same to be annexed.)

(Witness continuing.) The statements were rendered to Young, attorney, of the various purchases and sales of stock rendered on forms similar to those just put in evidence; the printed statement as to carrying of securities in general loans was on all Brown's printed forms, or accounts, or statements; had a conversation
21 with R. B. Young as to where the certificates of stock were which had been bought on this account; can't tell just when; it was in the course of doing business; think I had more than one talk on that subject; in doing business with us he had asked from time to time about his stocks that he had sent in as collateral, where they were, as to what bank they were in, or what bank was carrying those stocks for us; R. B. Young, attorney for John M. Shaw & Company, would buy certain stocks through J. Francis Brown & Company, and instead of putting in money he would send in stocks to take the place of money, and those stocks would go into our loans or wherever we chose to put them, and they would serve the same purpose as money; wherever we or the brokers made loans with brokers these stocks would go on that account; for instance, if we made a loan of $10,000 with certain brokers, or three or four in one day, we would take the stocks Mr. Young sent us and make loans with them as collateral, not on Mr. Young's account; all the stocks would go into a general pool together, loans made for the purposes of our own business, without applying them to any particular account; that is to say, we borrowed money from various blocks of stock and applied them to the general purposes of our business; that is the custom in the Boston stock market, and was in 1903; I had a conversation with R. B. Young about this, where the stocks were, and borrowing on general loans; he would ask me from time to time where his

stocks were and I told him; there was conversation between me and R. B. Young upon this, that is, our pledging these stocks upon general loans; I told Mr. Young we had pledged most of his stocks with Brown, Reilly & Company on general loans; I had said this more than once; in June, 1903, I had a conversation with R. B. Young about J. Francis Brown's condition; it was on Hooker Day,
22 June 25th; prior to this conversation there had been a payment by Brown & Company on this account, on the 24th; Tuesday, the 23d, I think it was; do not remember the exact date; it was Tuesday, I know; $5,000; on the day that payment was made Young and I had a conversation; I opened it; before the payment was made, I said "R. B." (I called him R. B. because I knew him very well)—I said, "R. B., why are you drawing this money?" He said there had been some big accounts drawn down from him; some big customers had drawn him down and he wanted the money; wanted it very much; he had made the demand for $5,000 on me; that was before this conversation; he simply wanted me to pay him $5,000; he said, "I want $5,000 of that tomorrow, Lawrence;" that's all; I said, "All right;" we gave it to him the next day; I remember taking the check down; he had called several times on the 'phone, asking where the check was, the day before; I did not have the check made out till about noon, and between the opening of the exchange and noon he had called me several times on the 'phone, asking where that check was, and I said I would get it down to him before the exchange closed, and I remember it was about 12 o'clock when I got it down; then I said, "R. B., why are you drawing this money from us?" and he said that a big customer had drawn him down and he needed it; that was all he said about that; Henry C. Young was away at the time, and I don't know where; he was manager for J. Francis Brown; the last thing I saw of him was June 17th, noon, the preceding week to the date of this payment; I asked R. B. Young where his brother was; asked him on the afternoon of June 17th; asked him if he knew where his brother was; said he did not; asked him again every day between June 17th and June
23d; asked him if he knew where his brother was; he said
23 he did not; the next day, Hooker Day, had a conversation with R. B. Young about Francis Brown's affairs in Royal B. Young's office; Young came up to me; he said, "Lawrence, your firm is busted; I know it as well as you know; I see it in your eyes; I want my money today and I want it quick; if you don't give it to me within thirty minutes I will attach your bank account and Board seat;" I said to him, "This is a holiday; it is almost three o'clock now; I can't do anything; the banks are closed;" he said, "I want the stocks, too, now, and go and see what you can do;" then there was some other conversation as to myself; he said that he and his brother had been very fond of me, but that I had made an awful mistake; that I knew perfectly well where he stood with Shaw, and he said, "You know it will go hard with me if I don't get my money, and I want it, and I want it quick; when he asked for the stocks there was no conversation at that time about where the stocks were; this was all the conversation that day; saw him next day; J. Francis

Brown was then in the country; not very well; did not come there Hooker Day; was seventy years old; think he did not come the day after Hooker Day; in his absence H. C. Young had financial charge of the business; he was not there; had not been there since the 17th; have stated the conversation with R. B. Young on the 26th; I tried to get the stocks for him; day after Hooker Day saw him about ten minutes to three at his office; when I went down with those stocks which were ready for delivery to him he gave me the name of the Beacon Trust Company; wanted me to have the stocks down to the Beacon Trust Company; he simply notified me to take the stocks to the Beacon Trust Company, where I would find a check waiting for me in payment of the loan; there had been figuring between us that morning; Mr. Young sent over a slip Friday morning verify-
24 ing the account; Mr. Young sent over his figures, a transcript of his account with me, to check over with our stock ledger and see if it agreed, which I did; I have not that particular memorandum which he sent over to me; have not looked for it; don't know where it is; simply a mem.; compared it with our ledger; it was in shape of a debit and credit account.

(Paper shown witness.)

So far as I can remember, that is a copy of the slip which Mr. Young sent me the morning after Hooker Day; there may be an item which was not on that; I can't tell that; this particular paper in my hand was made recently; I made that up as a statement or a copy of the memorandum which Mr. Young sent me that morning.

Paper marked for identification, Exhibit 3.

At this point the witness was withdrawn with permission of the Court.

Plaintiff's counsel then called the plaintiff HENRY A. RICHARDSON, who, being duly sworn, testified as follows:

Am a lawyer; am trustee elected by the creditors of J. Francis Brown & Company; have heard the testimony of Mr. Fletcher in regard to the slip or memorandum of account which he received from Royal Young on the morning after Hooker Day; Brown's books and papers came into my possession as trustee; have looked for this particular slip that Mr. Fletcher has been talking about; have not been able to find it.

25 Plaintiff's counsel then recalled LAWRENCE B. FLETCHER:

When I prepared this Exhibit 3 for identification I prepared it with another paper containing a list of these stocks; my memory was refreshed by that list; I personally made this memorandum, Exhibit 3 for identification, this morning; had a copy, a transcript, of the ledger of J. Francis Brown & Company; I intended to have that copy made to show how Mr. Young sent in every day his pencil memorandum of how his debit balance and his account stood, so that we may check it up with our debit balance and show our stock account, so every day at the close of the business we may find we are right; I had in mind that particular memorandum sent in by Young,

the last one he sent in; I intended to make it in the form of the regular one; it was a regular custom of his; I made this up from a transcript of the ledger, not from the ledger; the ledger is here; it shows all the stocks that J. Francis Brown & Company were carrying on that date; I want the jury to understand that I have a recollection that this statement or memorandum which Royal Young sent me on June 26th contained a balance struck; I have already testified that he told me that he wanted his stock; I was to deliver stocks and he was to pay the balance of the purchase price upon them; the occasion there was to strike a balance in money when he was to take the stocks and pay us all he owned us was in order to have us deliver the stock to him; he would have to pay us the correct amount of his indebtedness to us to the cent on the ledger; in order to send me the amount of his indebtedness to us he would have to strike his balance against us; in order to determine the price of the stocks or what the stocks were worth and the various kinds of stock to make up the account
26 on margin he would have to make up that kind of paper; when I made up this paper, Exhibit 3 for identification, I had before me the sheets which are now handed me, transcripts of the ledger of J. Francis Brown & Company as to this account; all are in my handwriting except the last one, which is simply a memorandum of the stocks made some months ago; they are correct; I used them in making this Exhibit 3 for identification; the statement which Young rendered coincided with the account on our office books; I remember that it did.

Plaintiff's counsel then offered in evidence the account from the ledger, pages 1 to 6, being the account the witness stated he used in making up Exhibit 3 for identification.

Received and marked Plaintiff's Exhibit 4.

(Same to be annexed.)

Plaintiff's counsel then offered in evidence the Exhibit 3, which has been marked for identification.

Same received and marked Plaintiff's Exhibit 3.

Upon call of plaintiff's counsel, the defendants then produced the statement rendered by Brown & Company to Royal B. Young, attorney, dated June 1st, 1903. It was thereupon offered in evidence by plaintiff's counsel.

Same received and marked Plaintiff's Exhibit 5.

(Witness continuing:) The figures in that column on Exhibit 5 represent the account from May 1st to May 31st, inclusive; our house bought certain stocks for Shaw & Company, or sold stocks for them; received cash for margin; paid checks to them from time to time, or money; received some stocks which were pledged for margins, and the stocks pledged for margins are in the account; we keep a
27 stock book showing just what stock every customer had, and by going back to that book and checking off and verifying the slip or whatever was sent in with that book, you could find whether those stocks were on that account or not; the stocks on that Exhibit 3 are those which remained after the account of buying and selling stocks had been closed out: that was the proceeds or what was left over after buying and selling, and stocks left for margin; when

Young sent that memorandum I compared it with our ledgers and found it correct; the certificates of stock represented by that memorandum were in different places on the morning of June 26th; by places I mean in different loans; they had been pledged; I paid up the loan; they were pledged with Brown, Reilly & Company, the County Savings Bank, and the First Ward National Bank; I substituted other stocks for those stocks in bank and I paid by check for the other stock taken out of the loan; I got these various stocks together for them; the bulk of these stocks were pledged with Brown, Reilly & Company; when I got these stocks together I took them over to Young's office; about five minutes of three; saw him there; had a conversation with him at the time the stocks were delivered; they were finally delivered to the Beacon Trust Company on his order; Young did not go with me there; this conversation was before I went to the Beacon Trust Company; I said to Young, "R. B., here are your stocks"; I said, "You lied to me when you told me that a big customer had drawn you down and you wanted the $5,000 Wednesday;" he said, "I know I did, but you know how I stand with Shaw, and you know what it means to me if I don't get these stocks;" he told me to take the stocks and deliver them to the Beacon Trust Company and I would get a check from
28 them for these stocks; the amount was not stated; the amount had been on the statement he sent me that morning; this amount on Exhibit 3, $34,919.52; I took the stocks to the Beacon Trust Company, as he directed, and delivered them to the president; got a check for this amount $34,919.52; that is the receipt.

Plaintiff's counsel then offered in evidence the receipt.

Same received and marked Plaintiff's Exhibit 6.

(Same to be annexed.)

(Witness continuing:) Mr. Gale, who signed this receipt, was president of the Beacon Trust Company; I got a check from him.

Plaintiff's counsel then offered in evidence, by consent of defendants' counsel, a copy of the check.

Same received and marked Plaintiff's Exhibit 7.

(Same to be annexed.)

(Witness continuing:) It was about five minutes of three when I went to the Beacon Trust Company to deliver these stocks for the account of Shaw by order of Mr. Young, and after Mr. Gale had checked off these various stocks, and there was something like ten or twelve of them, it was then about three o'clock; I asked Mr. Gale if I could use the telephone to find out if there was anybody in our office who could endorse that check, and I talked with Mr. Benton, who was the only one there, and he said Mr. Rollins was not there; he had the right to endorse and sign for Brown & Company; Brown was away; so I asked Mr. Gale, because of the lateness of the day, if he would please make that check payable to Brown, Reilly & Company, which he did; the money had to go to Brown, Reilly &
29 Company because I had agreed to pay them that day for the stock that we took out of them on that day; (check of $5,000

shown witness); I recognize that check; a check for the payment of $5,000 on June 24th.

Plaintiff's counsel offered check in evidence.

Same received and marked Plaintiff's Exhibit 8.

(Same to be annexed.)

(Receipt shown witness.) That is a receipt for the check.

Plaintiff's counsel offered in evidence the receipt.

Same received and marked Plaintiff's Exhibit 9.

Cross-examination by DEFENDANTS' COUNSEL:

The transaction commenced in February, 1903, I think, and closed at the end of June, about six months; during that time John M. Shaw, through Young, had occasion to draw money from time to time in various sums; a dozen times or more; in sums of $1,000 up; and that was when there were varying credits to their account and they were drawn down; credits above the amount of margin stipulated between our firm and theirs; the agreement was to keep ten per cent., I think; so that when it got up to about thirty per cent. it was not an unusual thing for them to draw down some money; before they drew the $5,000 the market had crept up to about thirty per cent., I think; it was absolutely in the usual course of business for them to draw that $5,000; when I had the talk with Royal Young, preceding the assignment two or three days, he wanted his stock and was prepared to pay us the money; he was ready to pay his debit balance, and demanded of me to give him the stock that we had on deposit in our business, which we were carrying for his account; we were carrying so many stocks and he owed us so much money; and when he paid the money we were bound to deliver him the stocks; they were our stock; I contend that they were our stocks; I think until Mr. Young paid us his debit balance they were our stock; we were carrying our stock for ourselves; I think all the stocks were ours; all in this list, Exhibit 3; in that list there were stocks included which had been handed us by Young or Shaw & Company as part margin; I personally contend that those also belonged to J. Francis Brown; I should say that shares put up as collateral security as margin by Young or Shaw & Company belonged to J. Francis Brown; was twenty-five years old in June, 1903; had been in the brokerage business since January 1st, 1899; first experience with J. Francis Brown; he was my uncle; Albert Brown, of Brown, Reilly & Company, also my uncle; his brother; they were brothers of my mother; my first business experience was not with my uncle, J. Francis Brown; had been with a national bank in Boston; I did not have an active account with J. Francis Brown; had an account of two items, maybe three; the ledger will state; don't remember when that account commenced; I should say it was along in 1902; my own personal account; I think it was Amalgamated and Tri-Mountain; it lasted up to the time of the failure; still exists; nothing the matter with my memory; I think there was an item of Amalgamated bought and sold; I think one hundred shares, and twenty-five shares of Tri-Mountain, and one hundred shares of Steel preferred; I think that is all; there may possibly have been two hun-

dred shares of Amalgamated; I think not; am ready to testify that my account was not over five hundred shares; the condition of that account as it shows on the book would show a loss of, I think,
31 twelve or fifteen hundred dollars; that is the whole loss that I had on the stock; H. C. Young was the confidential manager of the business of J. Francis Brown, brother of Royal B. Young; H. C. Young had access to the books and knew the condition of the accounts; he and his brother Royal B. Young were friendly at times; I had no other accounts with the firm of J. Francis Brown, for which, if there had been a loss, I would have been responsible; I had quite a number of other accounts for customers that I was speculating for them; I don't think that I was responsible whenever those accounts became "under water"; H. C. Young and I never had any discussion on the subject as to whether I was under water on those other accounts; never as to whether I was liable or not; all I considered myself liable to J. Francis Brown was the twelve or fifteen hundred dollars; in June, 1903, I was forced to assume the management of the concern because the manager disappeared suddenly, June 17th, 1903, ten days before the failure; I did most everything in the office that was necessary to be done; looked after the clearing house sheet; looked after what customers had; looked after loans; would do everything that was necessary to be done; did not sign checks; J. Francis Brown was a sick man; he was in business during June, 1903; don't remember whether he was there every day from the 17th to the 27th; I know he was quite ill from June 1st until the 20th, and then he was some better; I could not tell whether he came every day between the 17th and 27th of June; I was in business every day from ten to three; would have seen Mr. Brown; I can't tell about whether he was there; Mr. Rollins had power to sign checks, and he and I took the managership of the office; I would arrange matters and Mr. Rollins would sign the checks and do that sort of thing; Jones was
32 cashier; Mr. Brown was away most of the time between the 17th and 27th; the two Youngs, so far as I know, had no connection in business; entirely separate interests; Royal B. Young was the manager for a stock broker; don't think he had any connection with any exchange in business; don't think he was a member of any exchange; was merely the manager, as I understood it, for these defendants, who had the business in New York; we were carrying quite a line of stock around the 26th of June for J. M. Shaw & Company; quite good-sized lots; should think there were a dozen; I can't tell whether there were a dozen independent aside from the shares which were delivered to us on deposit; I don't think I can take this list, this twenty different kinds of stock, and tell you which lots were on deposit there as margin; don't see how I can; don't believe I can when they were dealing in thousands of shares; I think I might be able to tell you what stock would look like margin stock; the account will show that; I don't know as the ledger will show; the stock book would show; the ledger only shows the stock bought and sold on that account; other stocks that would go to make up that list would be stocks left on margin; if I had time enough I would pick it out.

It was then conceded by both sides that the list produced was, subject to any errors which might afterwards be discovered, of the stocks bought and stocks which had been left as collateral on deposit for margin, which list was thereupon offered and received in evidence and marked Exhibit 10.

On Exhibit 10 there are eleven stocks bought by us and carried for the account of Shaw; there are eight different lots and shares which were placed with us on deposit by Shaw; the item of
33 May 26th on the second page of Exhibit 5, 125 Amalgamated dividend, that we were carrying for Shaw on that date; we gave them credit for the dividend when it was declared; the item on page 3 of Plaintiff's Exhibit 5, May interest $122.58, is interest that is charged on the debit balance for the month of May, 1903; on June 1st the debit balance was $24,238.68; on June 26th the debit balance increased to $34,919.62, if these figures are correct; so that on June 1st Shaw & Company owed our firm twenty-four thousand and odd dollars against a lot of stock we were carrying for them; and on June 26th they owed us thirty-four thousand and odd dollars against a lot of stock we were carrying for them; if they had not drawn out the $5,000 on the 24th they would have owed us twenty-nine thousand dollars and odd.

Q. Now, when they drew it you were not curious to know why they drew it?

A. I asked them.

Q. You said on the stand, but I couldn't understand, and don't know why you wanted to know, when they had over thirty per cent. margin, what their reason was for drawing $5,000 down. Now, why did you want to know it?

A. Because I had good reason to believe that Mr. R. B. Young was nervous about it; that is why I asked him; based on things I had heard; nothing I had done; not based on any fear I had of my own shortages or being "under water"; never considered that a minute.

Q. And it was quite a usual thing in the course of the business when a customer's credit rose, either by profits or deposit, so that his margin was away beyond the required amount for him to drawn down?

A. Not quite such a large amount as that.

Q. Against $45,000 worth of stock he had then about $17,000 margin before he drew the $5,000?

A. About $15,000.

Q. Just look again and see?

A. Well, it was between $15,000 and $16,000 margin that he had, didn't he?

A. Yes, sir.

34 Q. Now, of the $45,000 of stock which you were carrying for him at the time, that would have been at that rate of 33 1/3%, one-third?

A. About that; yes, sir.

Q. And your requirements were only 10%, so that he had 23½% surplus there, didn't he?

A. Yes, sir.
Q. His real requirement of margin was only $4,500?
A. Yes.
Q. And he had nearly $16,000?
A. Yes.
Q. And you thought it was unusual for him to take $5,000?
A. Yes, sir.
Q. And you say that three times a day the calculations were made by which you fixed the amount of margin required, morning, 10 and 3 o'clock?
A. I think you misunderstood that; I said if the slips were sent in either at ten in the morning, noon, or close, they were figured as to the stocks at that moment, taken from the board, whether it be morning or noon, or in the afternoon; not that they were figured three times a day; I would like to straighten that out; they were figured whenever the slips were sent in according to the going prices, or whenever a man made a call to draw down, or when we found we needed more margin; those were the occasions of calculating with respect of his account; on June 26th, when it came to my turn to gather these stocks together, I had to go around to Brown, Reilly & Company, the County Savings Bank and the First Ward National Bank, three different establishments, to gather these stocks together and have them all in hand; about ninety-five per cent. of these stocks were in Brown, Reilly & Company's hands that day; in those two banks there were four items amounting to four or five thousand dollars; I think as much as that; I did not give the checks of J. Francis Brown to these two banks to take up the stock; I acquired the
35 stocks and gathered them in on that day by exchanging; took other securities belonging to J. Francis Brown; we made loans from time to time with Brown, Reilly & Company; got them from Brown, Reilly & Company; took the Brown-Reilly stock to these banks, changed the securities, and brought the other securities back and handed them to Brown, Reilly & Company, so that I got them all together; then we delivered them to R. B. Young, Friday, June 26th; I don't think I handed them to him physically; went to the Beacon Trust Company and there received our check for $34,919.62 and handed the securities to the gentleman in charge there; Young not present; I made no distinction of any kind between these eight lots of deposit stock, which was held by us as collateral, and the eleven lots of stocks, which we had bought for the account of Shaw & Company, mixed them all together, considered them in a lump as being in our hands on the same equality; never saw a time when John M. Shaw or Royal B. Young didn't keep up their margin with us in all their dealings; never had occasion to call on them; they made profits; I think it was a rather fortunate account; I think that $2,000 was the largest amount he had drawn; was not surprised when he drew money from time to time; our firm was pleased when he allowed them to accumulate so that large amounts were left there; I testified on my direct-examination that I told Royal B. Young that J. Francis Brown had pledged nearly all his stock with Brown, Reilly & Company.

Q. Now, isn't it a fact, Mr. Fletcher, that Brown, Reilly & Company really took care of J. Francis Brown in all his stock transactions?

A. I didn't understand that question.

Q. You say he pledged nearly all his stock. Didn't he pledge all his stocks with Brown, Reilly & Company?

A. No, sir. You are speaking about Mr. Young?

Q. J. Francis Brown.

A. Oh, no, indeed.

36 Q. Mr. Brown, as a matter of fact, pledged all his stock with his brother of Brown, Reilly & Company; isn't that so?

A. Not at all; no, sir.

Q. But you say that he had pledged nearly all his stock; you testified to that?

A. I testified that he pledged nearly all Mr. R. B. Young's stock.

Q. I understood you to testify that you told Mr. Young that J. Francis Brown had pledged nearly all his stock with Brown, Reilly & Company. You mean to say those were the stocks of Royal Young?

A. When I say his I mean Young; if these stocks which we were carrying for John M. Shaw & Company made a profit, that profit belonged to Shaw over and above his balance; we didn't figure it as a profit; everything belonging to Shaw over and above what he owed us; stocks and dividends, interest and profits, all belong to Shaw over and above what Shaw owed us on account of the stocks; and when Shaw paid us finally the $34,919.62 he paid his debt to us; when dividends were declared they were credited up; that's the custom, among brokers in Boston, to credit dividends and charge interest on debit balances.

On his redirect-examination the witness testified: In speaking of pledging R. B. Young's stocks I include both the stocks which he had given to us as collateral as well as the stocks bought on his account.

On his recross-examination the witness testified; There was another account which our firm had with J. M. Shaw, dealing in New York stocks through the New York house of J. M. Shaw & Company; when this matter was finally closed on June 26th and J. M. Shaw took away his stocks in Boston, the New York account of J. Francis Brown with J. M. Shaw was still left; I think there was a small

37 balance there; I think it is there; this New York account was handled in precisely the same way our Boston account was, crediting dividends, charging interest, and doing precisely the same way; there was no difference made in the way they handled the account between Boston and New York, from the way in which they handled the account from New York to Boston; the transactions were made in New York; I believe the statements were sent from New York to Boston. It is only a question of whether they came through Mr. Shaw's Boston office or not; I don't know whether the books were kept there in Boston or New York; the transactions were made on the New York Exchange.

(The plaintiff then rested, but was afterwards allowed to reopen the case for further evidence.)

Plaintiff's counsel then recalled LAWRENCE B. FLETCHER.

In Plaintiff's Exhibit 6 the word "placed" means that a larger certificate than the amount called for by us was turned over to us, so that we may fill in the amounts due us and get a certificate, a new one, in our name from the transfer office the next day, and the remaining amount go back; not necessarily to Brown, Reilly & Company; we received that certificate from Brown, Reilly & Company for a certain number of Trinity shares, for a larger amount than fifteen shares; we turned over that certificate to Mr. Gale; he was only to receive fifteen shares; he afterwards returned, either to us or the person who was to get it, a certificate for the difference between the fifteen shares he was to get and the larger amount which I gave him;

38 I don't remember the number of shares which that certificate calls for, the one I turned over to Mr. Gale; I know it was for more than fifteen shares here mentioned; that certificate for this larger number of shares never came from Shaw & Company, the certificate itself; in the next entry, 10 American Woolen preferred, the significance of the ditto mark is that the stock was placed in just that same instance as I have suggested; that is to say, the certificate turned over to Mr. Gale was a certificate for a larger amount of shares than is there mentioned on this receipt; that is the case with the 15 Steel Common, the next entry under which the ditto marks are; that is the fact with the next entry, 15 Dominion Iron & Steel, under which the ditto marks are; that is the fact with the next entry, 7 Sugar Common, under which the ditto marks are; as to the Dominion Iron & Steel, 15 was placed and a 50-share certificate was delivered; it is on the book there; there were 65 shares, as I remember; there is 15 there and 50 there (indicating); the certificate was 50 and the 15 was placed; the 50-share lot was in one certificate and the 15 was placed; there was a certificate of 50 shares Dominion Iron, which is referred to in this entry in the third column on this receipt; then there was 15 shares of Dominion Iron on the larger certificate; that is the significance of these ditto marks; the same with this entry of 7 Sugar Common; those ditto marks now referred to are the American Telephone Common, and the next one the Amalgamated; the same state of facts exists in regard to this entry of 24 American Telephone Common as in regard to these preceding stocks I have been asked about; there was a certificate for a larger number of shares than 24; that is the fact with the next entry, 10 Amalgamated Copper; there was a larger certificate, which was afterwards broken up, and Mr. Gale kept 10 for this account, and the difference was sent back to

39 the party who owned it; none of the certificates for these larger number of shares than are there mentioned in that first column of this receipt had been delivered to us by Shaw & Company; this receipt, Exhibit 6, is in my own handwriting, with the exception of the names; all in my handwriting except the name and signature; I made up the receipt from the certificates; the numbers represent the number of the certificates in the second and third columns of this receipt; we put in the first column of the receipt the placed stock or certificates, the ones we called "placed," and in the

second and third column the number of the certificates; there were three columns of certificate numbers and one column of the placed stock; in other words, those numbers on this receipt are the numbers on the identical certificates of the stock which were delivered to Gale by me; I assembled these stocks which were delivered to Mr. Gale by the aid of Brown, Reilly & Company; Brown, Reilly & Company had most of the stocks which were pledged, and there were two other parties, bankers; I got these stocks from these other two places with the help of Brown, Reilly & Company; so that Brown, Reilly & Company had in themselves all the stocks which I subsequently delivered to Mr. Gale; I turned over to Brown, Reilly & Company the check Exhibit "C" for $34,919.62.

Q. Now, in order to get that change of stock from Brown, Reilly & Company, and in order to deliver them to the defendant, or, rather, to Mr. Gale, did your firm have to pay to Brown, Reilly & Company anything more than the $34,919.62?

A. Yes, sir.

Q. Was it all in cash or part in securities?

A. We turned over our check for $1,200, and Mr. Louis C. Benton's note for $5,000, and what margin they had on the account of Brown, Reilly & Company against our loans there; about $10,000; that is, they had margins on our loans there of $10,000; we allowed
40 that margin as portion of the payment of these stocks; that margin was not turned over in the form of checks; it was simply there to our credit and with that and Mr. Benton's note and our check for $1,200 made our transaction with Brown, Reilly & Company; Benton's note for $5,000 was to the order of Francis Brown & Company, and was turned over to Brown, Reilly & Company; that note was credited to Benton's account; Benton was "under water" with our firm, as the saying is, and that note was credited to him; this margin we had with Brown, Reilly & Company of some $10,000 was on other securities; it was there for our credit, and then our credit was wiped out to the extent of the value of those.

On his cross-examination the witness testified: These different figures which I have mentioned as having been turned over to Brown, Reilly & Company were for the purpose of straightening out our joint accounts with Brown, Reilly & Company; they had nothing to do with John M. Shaw & Company; referring to the number of certificates on Exhibit 6, I did not get those numbers from the books of J. Francis Brown & Company, nor from the books of Brown, Reilly & Company; not any of them; I got them from the stocks; I think I was in my own office when I got them; they were delivered to us by Brown, Reilly & Company, I think; I am almost positive.

Plaintiff's counsel conceded that in delivery of shares of stock it was the custom in the market to deliver shares of the same amount without regard as to whether they were the same shares received.

(Witness continuing:) It is not the fact that when J. Francis Brown failed on June 27th, 1903, that I owed J. Francis Brown $30,000.

41 Plaintiff's counsel then called ALBERT FLETCHER, who, being duly sworn as a witness for the plaintiff, testified as follows:

I was not here yesterday; I came on from Boston last night; I reside in Boston; brother of Lawrence Fletcher, the last witness; was in employ of J. Francis Brown & Company in June, 1903, and preceding month; stock clerk. (Exhibits 10 and 6 shown witness.) Can state whether or not the identical certificates mentioned on those receipts had been received from Shaw & Company.

Plaintiff's counsel conceded that the two Shannon bonds mentioned on Exhibit 6 were the identical bonds which had been delivered by Shaw & Company to J. Francis Brown & Company.

The witness then stated that all of the certificates of stock which went to Gale were different from the certificates which were received from Shaw.

Plaintiff's counsel conceded that the difference was simply in the certificate number, and that same quantity of the same kind of stock which came from Shaw was delivered to Gale.

Plaintiff then rested.

The defendants' counsel then moved for a direction of a verdict in favor of the defendants on the following grounds:

First. That the plaintiff has failed to establish a cause of action against the defendants.

Second. With respect to the payment of the $5,000 of June 24th, 1903, it appears from the evidence that whether that should be regarded as a preference or not—we claiming that it was not a
42 preference, but granting for the sake of the argument that it was a preference—it is necessarily merged in the second transaction of June 26th, 1903, when the defendants took up their stocks and paid what was owing upon them, and therefore the plaintiff is not entitled to recover in any view on the first cause of action stated in the complaint with respect to the $5,000.

Third. Upon the ground that the delivery of the stock to the defendant- on June 26th, 1903, did not constitute a preference within the meaning of the Bankruptcy Act; that the defendants were not creditors of J. Francis Brown & Company, received no payment or transfer of the property of J. Francis Brown & Company, and that the transaction does not constitute a preference.

Upon the further ground that the delivery of the stocks on June 26th, 1903, to the defendant- was not a transfer of property within the meaning of the Bankruptcy Act.

After hearing counsel for the defendant- in support of his motion and counsel for the plaintiff in support of his request to go to the jury upon the issues of fact as to the knowledge by the defendants through their agent Young of the insolvency of J. Francis Brown at the time of the payment of the $5,000 and of the settlement two days after, the Court rendered the following opinion:

The COURT:

HOLT, *D. J.*:

The question here, I think, is whether Shaw & Company were creditors. If a person who is insolvent parts with money to a person who is not a creditor, that does not constitute a preference.
43 It may be something else, but it is not a preference unless he pays money to a creditor.

There have been different views as to the nature of the relation between a customer and a broker. I think that the different theories that have been suggested are all somewhat misleading. Some courts say the relations are those of principal and agent; others, pledgor and pledgee; others, that it is an executory contract, and that the broker is a vendor and the customer a vendee. There is considerable analogy in the case of a customer and broker to all these cases, but it is not a simple case of pledge or agency or sale, and to hold that it is — an instance of the confusion which arises from such analogies. It is like the discussion that arose when the question came up about the liability of telegraph companies for sending messages. Some ingenious court asserted that they were common carriers, and then there was great discussion whether they were or were not. Their duties and their obligations were something like those of common carriers, but the comparison led to confusion.

Now, the question here is, what is the actual relation between the customer and broker. It seems to me that the fundamental fact is that the broker advances the money, or the credit, with which to buy the s-ock. Of course, a man could go and buy stock for cash as a man speculates in land or any property, but by reason of the facts that these large stock exchanges are established, that securities are dealt in so largely, and that the sale of them can be made so quickly, it is comparatively safe for the broker to buy stock or sell stock for the customer on a margin, so called, that is, on security much less than the value of the property. So that arrangement is made and a small margin is put up, but the essential point is that the broker raises for the customer the means of buying the stocks, and under the arrangement he takes the stocks and holds them as se-
44 curity for the money which he advances, and has the right to pledge them as security for borrowing the money.

Now, although inherent in that arrangement are the features to some extent of pledge and agency, the fundamental feature and relation is, I think, that the broker has advanced or loaned money or credit, and therefore is a creditor of his customer and holds the security for it and has the right to pledge the security.

Now, originally, of course, as early as the 41st New York, it was held in Markham *v.* Jaudan that a broker who parted with the security was guilty of conversion. He was a simple pledgee and could not part with security. The Court of Appeals had to modify that pretty soon, and later they had to admit that the broker had a right to pledge the securities, and it is established now by the later cases in New York, as in Massachusetts, that the broker is bound to have within his reach and be able to produce similar stocks on call,

but he is not obliged to keep the same stock at all. The result is, as stated by Judge Putnam in the case referred to yesterday of *Re* Swift in 7 Am. B. R.: "There was much discussion before me whether or not this rule is peculiar to Massachusetts, but it is so only in name and not in substance. The courts in New York use somewhat qualified language to describe the relation, but the substantial conditions are the same there as in Massachusetts."

I think that is obviously so.

The fundamental relation is that the broker is a creditor holding security, and the customer is not a creditor until after he has tendered the amount due to the broker and demanded his securities. When he has done that then he becomes a creditor if the broker does not give up the securities. That is what took place in this Wheat-
45 land case. In that case Wheatland had parted with the stock; a demand had been made upon him for it and he had failed to meet it, and therefore when later, for some reason or other, he went out into the street and bought tha- kind of stock with his money, and the customer who took the stocks knew that he had bought them, that they were not the stocks that he had purchased, but that he had gone out and taken his proper-y and bought these stocks, the court held that that transaction amounted to a preference. I think that would be the case here if Brown had parted with the securities, had admitted it, and refused to return them when demand was first made, and then on the eve of bankruptcy had gone and taken cash and bought these stocks and turned them over. If that had occurred a different case would be presented. As it was, Shaw & Company never made any previous demand for their stocks, and when the demand was made it was acceded to. Mr. Fletcher did not have them right in his pocket, of course. That would not be the case in any broker's office. If you go to your broker, tender the amount due and ask for the stocks, and he says, "I will get them for you in the offices where they are pledged," and he goes and does it the next day, that, in my opinion, is substantially acceding to the demand. You could not hold a party for conversion or liable in a suit because he did not give them to you at that minute. That is what took place in this case, and I do not see therefore that Shaw & Company ever occupied the position of creditors in the true sense. They were debtors, and until they had paid the amounts which were due to the brokers, they continued to be debtors, and that is what is held in these Massachusetts cases. Judge Lowell says in this very opinion: "It would seem that the customer could not at once maintain an action for that violation without a proper demand." And in this case of
46 Wheatland, "After Wheatland had parted with the control of the shares, and after repeated demand for them by Jordan and refusals by Wheatland to deliver them, Jordan had a valid ground of action against Wheatland." Judge Lowell, in commenting on that case, says, "I must take these words to imply that under a Massachusetts contract no right of action accrues to the customer until after demand." Judge Putnam says the same thing in the same case on appeal. As he puts it:

"A banker does not ordinarily have on hand sufficient funds to meet the checks of all his depositors if they should all draw simultaneously. A like rule applies to stock brokers. In one case as well as in the other, so long as either remains solvent he is presumed to be able to meet his contracts and no action can be maintained against a banker by a depositor without first drawing a check or making some other demand. Nor in the case of a stock broker unless demand is made for the stock."

Therefore, leaving out of view this five thousand dollar item, it does not seem to me that there was anything in this case on the settlement between the parties, except that the customer tendered the amount which he owed to the broker and demanded his securities, and the transfer of the securities was nothing but the delivery of collateral. The estate received all that was due to it, all that it had any property in, namely, the amount that was due from the customer to the broker.

Now, with respect to this payment of five thousand dollars, Mr. Leavitt has argued very ingeniously that Shaw & Company had made money in their speculations and were entitled to it and were not obliged to keep it there as margin; but the truth is, in my
47 opinion, it was not paid as a debt. There was no debt existing at that time. The debt was from the customer to the broker, and it was a case simply where a creditor has such large collateral, or securities so much in excess of the debt, that he was willing to increase the debt. It was an advance, in my opinion, from the broker to the customer to be ultimately settled when the account was closed with the customer. If he had not advanced the five thousand dollars, he could have got the securities by paying twenty-nine thousand dollars, and it may be called a partial settlement, or, more properly, an advance on the general account.

I think that in this case the plaintiff makes out no case of a preference and I shall direct a verdict for the defendant-.

Thereupon the Court directed a verdict for the defendants, to which counsel for the plaintiff then and there duly excepted.

And because the foregoing testimony, rulings and exceptions do not appear in the judgment roll, the counsel for the plaintiff has caused the foregoing bill of exceptions containing all the evidence to be prepared and settled.

Dated May 31st, 1905.

JOHN BROOKS LEAVITT,
Of Counsel.

The foregoing bill of exceptions is hereby allowed and made a part of the record in this cause and ordered filed as a substitute for the testimony in this case.

GEO. C. HOLT,
Judge United States District Court.

Dated Sept. 5, 1905.

(Endorsed:) Bill of Exceptions.

48 PLAINTIFF'S EXHIBIT No. 1.

J. Francis Brown,
Member of
Boston Stock Exchange.

Telephone,
Main 2979.

J. Francis Brown & Co.,
Bankers and Brokers,
15 Congress Street, Boston.

MAY 11, 1903.

Mr. R. B. Young, att'y:

Upon your order, we have this day Bought for your account and risk.

18 New Haven Rts. 1½		27.	
		90	
			27.90

Respectfully yours,

J. FRANCIS BROWN & CO.,
Per F.

It is understood and agreed that all securities carried in this account or deposited to secure the same may be carried in our general loans and may be sold or bought at public or private sale, without notice, when such sale or purchase is deemed necessary by us for our protection.

49 PLAINTIFF'S EXHIBIT No. 2.

J. Francis Brown,
Member of
Boston Stock Exchange.

Telephone,
Main 2979.

J. Francis Brown & Co.,
Bankers and Brokers,
15 Congress Street, Boston.

MAY 13, 1903.

Mr. R. B. Young, att'y:

Upon your order, we have this day Sold for your account and risk.

1 C. J. R.	150½	150.50	
Com.	.....	.25	
			150.25
20 Isle Royale	10½	210.	
Com.	.....	2.50	
			207.50

Bought.

40 Panot		28½	1140.
Com		....	10.
			1150.

Respectfully yours,

J. FRANCIS BROWN & CO.,
Per F.

It is understood and agreed that all securities carried in this account or deposited to secure the same may be carried in our general loans and may be sold or bought at public or private sale, without notice, when such sale or purchase is deemed necessary by us for our protection.

50 PLAINTIFF'S EXHIBIT No. 3.

J. M. Shaw's Deb. Bal. from Le-ger of J. F. B. & Co			34,919.62
1070	Shannon Copper	11½	12,305.
10	Allowez	6	60.
10	Araslon	13	130.
10	Amer. Wool Pfd	76	760.
20	Winona	9	180.
50	Elm River	3	150.
50	Mass. Elec. Com	26	1,300.
15	Trinity Copper	5¾	86.25
15	U. S. Steel Com	20	450.
65	Dom. Iron	17½	1,137.50
20	Copper Range	54	1,080.
3	N. Y. N. H. & H. Ry	196	588.
5	Sug. Pfd	118	590.
7	" Com	119	833.00
2 M	Shannon 7's	80	1,600.
50	U. S. Wire	22	1,100.
20	Adventure	7	140.
360	Amalg	54¾	19,710.
24	Amer. Tel	141	3,384.
			45,583.75
			34,919.62
	Margin		10,664.13

Exhibit No. 4.

151

Boston, Feby. 8/05.
U. S. Dist. Ct.

R. B. Young, Atty.

in account with
J. Francis Brown & Co.,
Bankers and Brokers,
15 Congress Street.

It is understood and agreed that all securities carried in this account or deposited to secure the same may be carried in our general loans and may be sold or bought at public or private sale, without notice, when such sale or purchase is deemed necessary by us for our protection.

1903.		Dr.	1903		Cr.
					152
2/10	100 Utah 31 7/8.....	3,987.50	2/10	Ch on a/c.....	500.
2/10	100 Mass Cop 17 3/4.		2/19	Ch 100 Amer Tel...	16,612.50
2/11	100 Utah 32 1/2.....	3,262.50	2/25	Ch on a/c.....	500.
2/19	100 Amer Tel 166....	16,612.50	3/2	100 Utah 29 1/2....	2,937.50
	20 Amer Tel 168 3/4	3,380.	3/3	100 Allowez 5 1/2..	543.75
	5 Amer Tel 168 1/2	843.75		50 Mass Cop 10 1/2.	518.75
2/27	500 Shannon 12 1/2..	6,312.50		100 Mass Cop 12 1/2	1,237.50
3/4	100 Allowez 5.....	506.25		50 Mass Cop 12 1/4.	606.25
3/5	100 Utah 29.....	2,912.50	3/4	100 Mass Cop 10....	987.50
3/11	Feb int.....	30.27		Error int Feb 1%...	5.04
3/13	Ch ctf 100 Utah.....	3,012.50	3/5	Ch Ctf 100 Utah....	2,912.50
3/16	100 Atlantic 14.....	1,412.50	3/6	100 Mass Copper 11 1/4.....	1,112.50
	200 Oil 16 1/2.....	3,325.	3/10	100 Utah 29.....	2,887.50
	100 Oil 16.....	1,612.50	3/11	100 Allowez 5 1/2..	543.75
	Ch Ctf 50 Cop Range	3,543.75	3/13	100 Utah 30 1/4....	3,012.50
3/19	150 Utah 29 5/8.....	4,462.50	3/16	50 Cop Range 71....	3,543.75
	50 Mass Cop 10 3/4..	543.75		Ch Ctf 300 Oil.....	4,237.50
	Ch Ctf 50 Mass Cop..	543.75	3/17	Ch Ctf 100 Atlantic	1,412.50
3/20	100 Elm River 5.....	506.25	3/19	150 Utah 29 5/8....	4,425.
3/23	50 Mass Cop 10 3/4..	543.75		100 Shannon 13 5/8.	1,350.
3/25	50 Old Dom 20.....	1,006.25	3/20	100 Elm River (Ch).	506.25
3/31	ch ctf 7 Sugar Com 100 Mass Cop.	1,500.	4/16	Div. 25 Amer Tel...	37.50
4/7	March int.....	44.04	4/16	10 Cop Range 59 1/2	592.50
	Ch on a/c.....	2,000.	4/27	50 Cop Range 64 1/4	3,206.25

	1903.	Dr.	1903.	Cr.
	4/16 ch Ctf 10 Cop Range.	592.50	20 Dom Coal 107 1/2	2,145.
	4/21 20 Shannon 14 1/4...	290.		
	4/24 50 Cop Range 66 1/2.	3,331.25		
	4/28 50 Shannon 14	706.25		
	4/29 20 Dom Coal 106	2,125.		
	4/3 100 Dom Iron 30	3,012.50	5/1 100 Dom Coal 27 1/2	2,737.50
	500 Shannon 14	7,062.50	20 Wool Pfd.....	1,547.50
	5/1 30 Dom Coal 107 1/2.	3,232.50	5/8 Ch Ctf 100 U. S. M.	2,000.
	Ch Ctf 20 Wool Pfd.	1,547.50	5/14 40 Panot.....	1,150.
	5/4 20 Dom Iron 25 1/2..	595.	20 Royale 10 1/2....	207.50
	5/5 30 Dom Iron 30	907.50	1 C. J. R. 150 1/2...	150.25
	5/6 20 Cop Range 64 3/4.	1,300.	5/15 30 Royale 10	296.25
155	20 Dom Coal 109 1/2.	2,195..	7 N. Y. N. H. & H. Rts 1 3/8	9.28
	April int.....	48.95	5/17 100 Royale 10.....	987.50
	100 U. S. Mine 24 3/4	2,487.50	100 Fruit 102.....	10,187.50
	5/11 Ch on a/c.....	2,000.	2 C. J. R. 150.....	299.50
	5/12 18 N. Y. N. H. & H. Rts, 1 1/2.....	27.90	Ch Ctf 100 Pere Mqt / 100 Dom Iron.....	11,500.
	5/14 40 Panot 28 1/2.....	1,150.	5/18 50 Dom Iron 23	1,143.75
	Ch ctf 20 Royale	207.50	100 Dom Iron 22 3/4	2,262.50
	5/17 25 Wyandotte 1 7/8..	48.44	5/19 3 N. Y. N. H. & H. Rts 1.....	2.85
	Ch Ctf 30 Royale.... / 100 Royale.... / 100 Fruit	296.25 / 11,175.	Ch Ctf 5 Utah	146.25
	5/18 100 Dom Iron 25....	2,512.50	5/20 50 Dom Coal 100...	4,993.75
	25 Dom Iron 24.....	606.25	50 Dom Coal 20	993.75
156	5/19 5 Utah 29.....	146.25	25 Dom Coal 20	493.75
	20 Dom Iron 24.....	485.	200 Oil 13.....	2,575.
	5/20 50 Dom Coal 96.....	4,806.25	50 Swift 111 1/2....	5,568.75
	50 Dom Coal 95.....	4,756.25	Ch on a/c.....	2,000.
	50 Trinity 8.....	403.13	Ch Ctf 100 Dom Coal	9,562.50
	Ck ctf 100 Dom Iron.	2,262.50	Ch on a/c.....	1,000.
	Ck ctf 50 Swift.... / Ck ctf 200 U. S. Oil .	8,000.		
	5/21 10 Dom Iron 14 3/4..	150.	5/21 100 Dom Iron 14 ...	1,387.50
	100 Dom Iron 17	1,712.50	Ch Ctf 100 Trinity..	806.25
	100 Dom Iron 16 1/2.	1,662.50	5/25 50 Mass Elec 29 1/4.	1,456.25
	50 Trinity 8.....	403.13	20 Osceola 65.....	1,295.

1903.		Dr.	1903.		Cr.	
5/25	10 1/2 Pa 128 1/8....	641.25		10 Dom Iron 16	157.50	
	150 Utah 31.....	4,668.75		10 Cop Range 61 1/2	619.50	
	8 Amer Tel 156.....	1,250.		1 Tamarack 120....	119.75	
	Ch Ctf 50 Elm River.			50 Oil 12 3/4.....	631.25	
	10 Allowez...	3,000.		50 Mass Cop 7 1/2..	371.87	
	1 Amer Tel..			Ch on a/c.....	2,000.	
	5 Gen Elec..			Ch ctf 150 Utah....	4,068.75	
	Ch Ctf 100 Mass Elec			25 Dom Iron		
	Com.....		5/26	125 Amalg Div.....	69.50	
	20 Osceola...			5 Mass Cop 5 1/2...	36.87	
	55 Mass Cop..	5,972.88		10 West End 91....	907.50	
	1 Tamarack.			10 Dom Coal 94....	937.50	
	10 Cop Range			100 Dom Coal 92 1/2	9,237.50	156
	50 Oil.....		5/27	9 N. Y. N. H. & H.		
5/26	110 Dom Coal 95	10,463.75		Rts 1.....	8.55	
	20 Shoe Pfd 29 3/4...	600.		Ch Ctf 10 1/2 Pa...	641.25	
	20 Shoe Com 47.....	945.		5 Gen Elec.....	800.	
	35 Dom Coal 96.....	3,368.75		50 Utah.....	1,568.75	
	Ch Ctf 10 West End.	907.50	5/28	18 N. Y. N. H. & H.		
5/27	50 Utah 31 1/4.....	1,568.75		Rts 1.....	17.10	
	100 Wool Com 11 3/4	1,187.50		20 Old Dom 16 3/8..	322.50	
5/28	500 M & B 1 5/8.....	828.13		Ch Ctf 500 M & B..	828.13	
	20 Old Dom 16 3/8...	332.50	5/29	2 Gen Elec 169 1/2..	364.50	
	10 Atlantic 10 1/4...	105.		Ch Ctf 10 Atlantic..	1,147.50	
	10 Mass Elec Pfd 85..	852.50		10 Fruit . ..		
	Ch Ctf 3 C. J. Rt....					159
	18 N. Y. N. H. & H. Rtr.....	449.75				
5/29	10 Cop Range 58.....	582.50				
	10 Fruit 104.....	1,042.50				
	10 Winona 10.....	102.50				
	Ch. on a/c.....	1,000.				
	Ch Ctf 2 Gen Elec...	364.50				
5/31	To Balance.....	24,238.65	6/1	5 Steel Com 31.....	153.75	
6/1	1 Dom Coal Pfd 116..	116.25		100 Royale 7 3/4....	768.75	
	20 Atlantic 9 5/8....	195.		20 Atlantic 9 5/8 ...	190.	

	1903.	Dr.	1903.	Cr.
	Ch Ctf 100 Royale... 5 Act.....	1,052.50	5 Amalg 57	283.75
	Ch on a/c.....	1,000.	Ch Ctf 10 Cop Range 100 Wool Com 10 Mass Elec Pfd..... 10 Elm River 20 Wyandotte	2,690.94
6/2	20 Mass Elec Pfd 85 1/2	2,131.25		
	40 Dom Coal 85 1/2..	3,430.		
6/3	10 Dom Iron 13	132.50		
	60 Dom Coal 75	4,507.50	6/2 50 Wool Pfd 77 1/2.	3,868.75
	40 Elm River 3 1/4..	132.50	50 Dom Iron 18.....	893.75
	30 Dom Iron 14 1/4.	435.	50 Dom Coal 90....	4,493.75
	100 Utah 29 3/4.....	2,987.50	10 Dom Coal 86	857.50
	Ch Ctf 50 Wool Pfd.	3,868.75	50 Dom Coal 86	4,293.75
161	Ch on a/c.....	2,000.	50 Dom Iron 14	693.75
6/4	10 Amer Tel 150.....	1,502.50	10 Dom Iron 13.....	127.50
	10 Wool Pfd 77 1/4..	775.	6/3 Ch Ctf 20 Shoe Pfd. 20 Shoe Com	1,545.
	May int.....	122.58		
	10 Mass Elec Pfd....	857.50	25 Dom Coal 73	1,818.75
	(Error) Ch Pere Mqt to J. M. S. & Co. P. B. Y.....	9,000.	1 Steel Pfd 80 3/4 ..	80.50
			Ch Ctf 100 Utah.... 25 Elm River	3,070.31
	Ch 2 M Cement River 1 Mergenthaler ..	2,196.52	6/4 1 Mergenthaler 184.	183.75
6/5	10 Westinghouse Rts 2 1/4	23.	2M Cement River 100.....	1,995.
	10 Wool Pfd 77.....	772.50	15 Amer Tel 150....	2,246.25
	20 C. J. R. 145.....	2,905.	Int on C. R. Bonds.	17.50
162	10 Mass Elec 27	272.50	6/5 100 Westinghouse Rts 2 1/2.....	245.
	10 Old Dom 15.....	152.50	33 Westinghouse Rts 2 1/2	80.85
	25 Aecodian 2 3/4 ...	70.31	Ch on a/c.....	1,000.
	Ctf 100 Amalg Ch 133 Westinghouse Rts	325.85	Ch Ctf 10 O. D. 10 Wool Pfd 10 Mass Elec Pfd 10 West Rts 15 Elm River	
6/8	5 Daly West 45 3/4..	230.	6/8 25 Mass Cop 6.....	146.87
	10 Mass Elec 26	262.50	5 Trinity 5 1/4	25.62
	6 C. J. R. 146 3/4....	882.	25 B & M 161	4,018.75
	10 Arcadian 2.....	20.63	10 Michigan 8.....	78.75

1903.		Dr.
	5 Adventure 6 1/8...	31.25
	20 Amer Tel 146 1/2.	2,935.
	20 Mass Cop 6 1/4...	127.50
	15 Adventure 6.....	91.88
	55 Dom Iron 13 1/4..	738.75
	2 Amer Tel 150.....	300.50
	Ch on a/c.....	1,000.
	Ch Ctf { 1 Steel Pfd. 25 Trinity.. 25 Mass Cop 25 B & M.. }	4,379.62
6/9	10 Mass Cop 6 1/4...	95.33
	30 Dom Iron 13	397.50
	20 Daly West 45 1/2.	915.
	10 Oil 12.....	122.50
	5 Mass Cop 6 1/2....	33.13
	10 Michigan 8.....	81.25
	100 Wool Pfd 76	7,612.50
	30 Wool Pfd 76.....	2,283.75
	100 Bonanza 70c.....	71.
	Ch Ctf { 15 Mass Gas Com.... 11 Mass Gas Pfd..... }	1,490.
	Ch Ctf 10 Elm River. 10 Wool Pfd .	770.
6/10	50 U. S. Oil 11 1/2...	581.25
	100 Allowes 6 1/8 ...	618.75
	50 Allowes 6 1/8	309.38
	50 Allowes 6 1/8	309.37
	10 Mass Elec Pfd 81 1/2.....	817.50
	Ch on a/c.....	1,000.

1903.		Cr.	
	Ch on a/c.....	1,785.	163
	Ch Ctf { 15 Adventure..... 10 Wool Pfd 96 C. J. R... }	4,651.37	
6/9	20 Trinity 5 1/2	107.50	
	15 Gas Com 40.....	596.25	
	11 Gas Pfd 81 1/2...	893.75	
	Ch Ctf { 40 Mass Cop 100 Bonanza 25 Mass Elec Pfd.... }	2,360.	
6/10	Ch on a/c.....	3,000.	
	Ch Ctf 100 Wool Pfd	7,600.	164
	5 Adventure 5 Daly West..... 20 Mass Elec..... 200 Allowes 35 Arcadian.....	1,925.	
6/11	Ch Ctf 60 Oil.....	600.	
6/12	50 Pneu Ser Pfd 18.	893.75	
	Ch Ctf { 10 Mass Elec Pfd..... 32 Amer Tel 20 Daly West... }	5,436.	
6/13	Ch Ctf 30 Wool Pfd.	2,283.75	165
	Ch Ctf 50 Cop Range	2,681.25	
6/16	Ch Ctf 10 U. S. M..	200.	
6/18	12 Gas Com 40.....	477.	
	10 Amer Tel Rts 6 1/6	60.14	
6/19	30 Dom Iron 13 1/2.	397.50	
	30 Dom Coal 89....	2,662.50	
	Ch Ctf " " { 30 Dom Iron 20 Mass Cop 100 Trinity. }	427.50 152.50	

166	1903.	Dr.	1903.	Cr.
			6/22 100 Daly West 41 1/2	4,137.50
			Ch Ctf 20 Rutland Pfd.	1,005.
			19 Amer Tel	2,747.25
			6/23 50 Wool Com	490.63
			Ch Ctf { 5 Mass Elec Pfd. 2 Amer Tel.	703.25
	6/12 10 Winona 9 1/2	96.25	6/24 Ch Ctf 60 Wool Pfd	4,477.50
	30 Dom Iron 14	427.50	6/25 17 Amer Tel Rts 6	101.15
	Ch Ctf 60 U. S. M	1,206.25	6/26 1070 Shannon	
	Ch Ctf 50 Pneu. Pfd.	893.75	10 Allowez	
167	6/15 20 Rutland Pfd 50	1,005.	10 Old Dom	
	50 Cop Range 53 1/2	2,681.25	10 Wool Pfd	
	30 Dom Iron 13 3/4	420.	20 Winona	
	30 Dom Coal 85	2,557.50	50 Elm River	
	6/16 14 Amer Tel 145	2,033.50	50 Mass Elec Com	
	6/19 100 Daly West 41	4,112.50	15 Trinity	
	5 Amer Tel 142 1/2	713.75	15 Steel Com	
	20 Mass Cop 7 1/2	152.50	65 Dom Iron & Steel	
	100 Trinity 6	606.25	20 Copper Range	
	Ch Ctf 19 Mass Gas	477.	3 N. Y. N. H & H.	
	6/22 2 Amer Tel 142	284.50	5 Sugar Pfd	
	5 Mass Elec Pfd 83 1/2	418.75	7 Sugar Com	
	6/23 15 Trinity 6	91.87	2M Shannon 7%	
	5 Amer Tel 142	711.25	50 U. S. Mine	
168	50 Wool Com 9 3/4	490.63	20 Adventure	
	6/24 25 Dom Iron 16 1/2	418.75	360 Amalg	
	30 Dom Iron 15 3/4	480.	24 Amer Tel	34,919.62
	60 Wool Pfd 74 1/2	4,477.50		
	10 O. D. 13 3/4	140.		
	Ch on a/c	5,000.		
	6/25 Int to date	124.63		
	Balance	909.28		
		124,641.49		124,641.49
			6/26 Balance	909.28

Plaintiff's Exhibit 5. 2/8/05 C. A. P. 169

Boston, June 1, 1903.

Mr. R. B. Young, Atty.

in account with

J. Francis Brown & Co.,
Bankers and Brokers,
15 Congress Street.

It is understood and agreed that all securities carried in this account or deposited to secure the same may be carried in our general loans and may be sold or bought at public or private sale, without notice, when such sale or purchase is deemed necessary by us for our protection.

May	Dr.	May	Cr.	
1 Balance	23,481.77	1 Ck ctf 20 wool pfd	1,547.50	170
30 Dom Coal 107 1/2	3,223.50	100 Dom Iron 27 1/2	1,737.50	
Ctf 20 Wool Pfd Ck	1,547.50	8 Ck Ctf 100 U. S. Mining	2,000.	
4 20 Dom Iron 29 1/2	595.	14 1 Chic Juc 150 1/2	150.25	
5 30 Dom Iron 30	907.50	20 Royale 10 1/2	207.50	
6 20 Cop Range 64 3/4	1,300.	Ck Ctf 40 Padot	1,150.	
20 Dom Coal 109 1/2	2,195.	15 30 Royale 10	296.25	
Apr int	48.95	7 N. Y. N. H. rts 1 3/8	9.28	
100 U. S. Mining	2,487.50	17 100 Royale 10	987.50	
11 Ck on a/c	2,000.	100 Fruit 10	10,187.50	
12 18 N. Y. N. H. rts 1 1/2	27.90	2 Chic Juc 150	299.50	
Ctf 15 Amal 20 Steel		Ck Ctf 100 Pere Marq		
		100 Dom iron	11,500.	
14 40 Panot 28 1/2	1,150.	18 50 Dom iron 23	1,148.75	
Ck Ctf 20 Royale	207.50	100 Dom iron 22 3/4	2,262.50	171
17 25 Wyndot 1 7/8	48.44	19 3 N. Y. N. H. rts 1	2.85	
Ck Ctf 30 Royale	296.25	Ck Ctf 5 Utah	146.25	
Ck Ctf 100 Royale	11,175.	20 50 Dom Coal 100	4,993.75	
100 Fruit		50 Dom Iron 20	993.75	
18 100 Dom iron 25	2,512.50	25 Dom Iron 20	493.75	
25 Dom iron 24	606.25	200 U. S. Oil 13	2,575.	
19 5 Utah 29	146.25	50 Swift 111 1/2	5,568.75	
20 Dom Iron 24	485.	Ck on a/c	2,000.	
20 40 Dom Coal 96	4,806.25	Ck Ctf 100 Dom Coal	9,562.50	
		Ck on a/c F. M. T. Protested	1,000.	
50 Dom Coal 95	4,756.25	22 100 Dom iron 14	1,387.50	
50 Trinity 8	403.13			

	May	Dr.	May	Cr.
172	Ck Ctf 100 Dom Iron	2,262.50	Ck ctf 100 Trinity	806.25
	Ck 50 Swift	8,000.		
	200 U. S. Oil			
21	10 Dom iron 14 3/4	150.		
	100 Dom Iron 17	1,712.50	25 50 Mass Elec 39 1/4	1,456.25
	100 Dom iron 16 1/2	1,662.50	20 Osceola 65	1,295.
	50 Trinity 8	403.13	10 Dom iron 16	157.50
25	10 1/2 Penn. R.R. 128 1/8	641.25	10 Cop Range 61 1/2	612.50
	150 Utah 31	4,668.75	10 Tamarack 120	119.75
	8 Amer Tel 156	1,250.	50 U. S. oil 12 3/4	631.25
	Ck ctf 50 Elm River	3,000.	50 Mass Copper 7 1/2	371.87
173	10 Allowez 1 Amer Tel. 5 Gen Elec		Cks on a/c	4,000.
	Check ctf. 100 Mass Elec	5,972.88	1 Ctf 150 Utah	4,068.75
	20 Osceola 55 Mass Cop. 1 Tamarack 10 Cop Range		25 Dom iron	
	50 U. S. oil		26 125 Amal Div	62.50
26	110 Dom Coal 95	10,463.75	5 Mass Cop 7 1/2	36.87
	20 Shoe Pfd 29 3/4	600.	10 West End 91	907.50
	20 Shoe Com 47	945.	10 Dom Coal 94	937.50
	35 Dom Coal 96	3,368.75	100 Dom Coal 92 1/2	9,237.50
	Ck Ctf 10 West End	907.50	27 9 N. Y. N. H. rts 1	8.55
27	50 Utah 31 1/4	1,568.75	Ck Ctf 10 1/2 Penn R. R.	641.25
	100 Wool Com 14 3/4	1,187.50	Ck Ctf 5 Gen Elec	800.
174	28 500 M & Bost 1 5/8	828.13	Ck Ctf 50 Utah	1,568.75
	21 Old Dom 16 3/8	332.50	28 18 N. Y. N. H. rts 1	17.10
	10 Atlantic 10 1/4	105.	20 Old Dom 16 3/8	322.50
	10 Mass Elec Pfd 85	852.50	Ck Ctf 500 M & B	828.13
	Ck Ctf 3 Chi. Juc	449.75	29 2 Gen Elec 182 1/2	354.50
29	10 Cop Range 58	582.50	Ck Ctf 10 Atlantic	1,147.50
	10 Fruit 104	1,142.50	10 Fruit	
	10 Winona 10	102.50		
	Ck on a/c	1,000.		
31	2 Gen Elec Ck	364.50	Balance	24,238.68
	ch 1 M Shannon 5%			
		117,841.08		117,841.08

May	Dr.	May	Cr.
6/1 Balance.....	24,238.68		
May Int.....	129.58		
Long Stocks		Short Stocks.	
34 Am. Tel.		100 Pere Marq.	
1070 Shannon			
260 Amalg.			
20 Adventure			
2M Shannon 7's			
7 Sug. Com.			
5 Sug. Pr.			
3 N. Y. N. H. & H. R. R.			
30 Cop. Range			
45 Dom D.			
35 Dom Coal			
30 Royale			
20 Steel Com.			
25 Wyandot			
50 Mass Elec			
50 Elm River			
20 Shoe Com			
20 Shoe Pr.			
100 Wool Com.			
10 Mass. Elec Pr.			
10 Allowez			
10 Winona			

175

176

177

THIS PAGE BOUND VERTICAL IN BOOK

180 179 178

Plaintiff's Exhibit 6. 2/8/05. C. A. P.

Exhibit 1, S. H. T., N. P. Dec. 17, 1904.

Received from BOSTON, June 26, 1903

J. FRANCIS BROWN & Co. A/c J. M. Shaw & Co.

Shares or Face Value	Stocks or Bonds	Name of	No. of Certificate.
15 Trinity Placed	2M Shannon	$309	100 Shannon A3776
	10 Winona	7% $307	c6907 100 Shannon A2210
10 Am Wool Pfd Placed	10 Winona	$2974 20 Adventure	2475 3100 Shannon A2209
	10 Allowez	$2921 3 N. Y. N. H. & H.	2028 100 Shannon A2213
15 Steel Com Placed	35 Elm River	B589 5 Shannon	1915
	15 Elm River	2290 15 Shannon	2154 50 Dom I. B0409
15 Dom Iron Placed	50 Mass Elec Com	2359 100 Shannon	A134 50 Acp D4233
	10 O Dom	B3626 100 Shannon	A132 100 Acp C5962
7 Sug Com Placed	20 Cop Range	7396 100 Shannon	A131 100 Acp C5963
	5 Sug Com J.	2560 100 Shannon	A397 3100 Acp C5964
24 Am Tel Com Placed	50 U. S. Mine x	9850 100 Shannon	A2212
		693 100 Shannon	A133
10 Amalg. Placed			JOHN H. GALE.

60

61 EXHIBIT 7.

BOSTON, MASS., *June* 26, 1903. No. 3352.

Beacon Trust Company, 197 Washington St., Sears Bldg.:

Pay to the order of Brown Riley & Co. $34,919.62 Thirty-four thousand nine hundred and nineteen 62/Dollars.

Payable through Boston Clearing House.

H. M. TAYLOR,
Acting Treasurer.

Countersigned
A. P. NOBLE
Teller.

(Endorsements:)

Brown, Riley & Co.

Endorsements Guaranteed
Pay to the Order of
Any National Bank
June 27 '03
American Loan and Trust Company
Boston
E. A. Coffin, Treasurer.

Endorsement Guaranteed
Received payment through
Boston Clearing House
June 27 1903
Nat'l Shawmut Bank
F. H. Barbour, Cashier.

It is stipulated that the above copy shall serve the same effect as the original.

62 PLAINTIFF'S EXHIBIT 8. 2/8/05. C. A. P.

J. Francis Brown & Co., 12466
Bankers & Brokers,
15 Congress St.

BOSTON, *Jun-* 24, 1903.

Pay to the order of R. B. Young Att'y $5,000.00 Five thousand.....Dollars
Not over five thousand 5000

J. FRANCIS BROWN AND CO.
C. H. ROLLINS, *Att'y.*

To the
American Loan & Trust Co.
Boston.

Stamped on face,
"American Loan & Trust Company
Paid
Jun- 24 1903
Receiving Teller
Boston."

Endorsed on back,
"R. B. Young
att'y
Pay to the order of
American Loan & Trust Co.
John M. Shaw & Co., Boston,
By —— ——.

63 PLAINTIFF'S EXHIBIT 9. 2/8/05. C. A. P.

BOSTON, *Jun-* 24, 1903.

J. FRANCIS BROWN & Co.
Bankers and Brokers,
15 Congress Street, Boston.

Ck.

Received from J. FRANCIS BROWN & Co.

Five thousand..... Dollars

Charge a/c R. B. Young Att'y.

$5,000.00

R. B. YOUNG, *Att'y.*

Endorsed on back: "Exhibit 1, S. H. T., N. P. Dec. 16, 1904."

CORRECTED EXHIBIT 10. BOSTON, 2/8/05. C. A. P.

in account with
J. FRANCIS BROWN & Co.,
Bankers and Brokers,
15 Congress Street.

It is understood and agreed that all securities carried in this account or deposited to secure the same may be carried in our general loans and may be sold or bought at public or private sale, without notice, when such sale or purchase is deemed necessary by us for our protection.

Stocks Bot.	Dr.	Stocks as Collateral.	Cr.
1070 Shannon 11½	12,305.	15 Steel Com. 30.....	450.
20 Winona 9	180.	3 N. Y. N. H. & H. 196..	588.
40 Elm River 3.....	150.	5 Sugar Pfd. 118	590.
50 Mass. Elec. Com. 26..	1300.	7 Sugar Pfd. 119	833.
15 Trinity 5¾.....	86.25	2 M. Shannon 80.....	1,600.
65 Dom. Iron & Steel 17½	1137.50	20 Adventure 7.....	140.
20 Copper Range 54...	1080.	360 Amalgamated 54¾ ..	19,710.
50 U. S. Mine 22.....	1100.	10 Amer. Wood Pfd. 76..	760.
24 Amer. Tel. & Tel. Co. 141..	3384.		
10 Allowez 6	60.		
10 Old Dom. 13.....	130.		
	20,912.75		24,671.

64 United States District Court, Southern District of New York.

HENRY ARNOLD RICHARDSON, as Trustee in Bankruptcy of J. Francis Brown, Plaintiff,
against
JOHN M. SHAW and ALEXANDER DAVIDSON, Defendants.

This action having been brought to trial on the 8th day of February, 1905, before Honorable George C. Holt and a jury, and the jury having on February 9th, 1905, by direction of the Court, rendered a verdict in favor of the defendants and against the plaintiff, and the costs having been duly adjusted at the sum of $89.50,

Now, on motion of Campbell & La Far, attorneys for the defendants John M. Shaw and Alexander Davidson, it is

Ordered and adjudged, that the defendants have judgment on the merits in this action dismissing the complaint herein, and that the defendants John M. Shaw and Alexander Davidson have and re-

cover judgment against the plaintiff Henry Arnold Richardson, Trustee in Bankruptcy of J. Francis Brown, for the sum of
65 eighty-nine and 50/100 dollars, costs of this action as taxed, and that they have execution therefor.

Judgment signed this 14th day of February, 1905.

THOS. ALEXANDER, *Clerk.*

(Endorsed:) Judgment.—Filed Feb. 14, 1905.

United States Circuit Court of Appeals for the Second District

HENRY ARNOLD RICHARDSON, Trustee, &c., Plaintiff in Error,
against
JOHN M. SHAW and An'r., Defendants in Error.

The plaintiff in error makes the following assignments of error:

1st. That the Court erred in directing a verdict for the defendants.

2d. That the Court erred in not submitting to the jury the question of fact whether at the time that J. Francis Brown, the bankrupt in question, made a transfer to the defendants of certain of his property, to wit, the sum of five thousand dollars, Royal B. Young,
66 the agent of the defendants acting therein, had reasonable cause to believe that it was intended thereby to give a preference to said defendants.

3d. That the Court erred in refusing to submit to the jury the question of fact whether at the time of the settlement between said bankrupt J. Francis Brown and the defendants on June 26th, 1903, and transfer by him to them of the securities on that day, the said Royal B. Young had reasonable cause to believe that it was intended thereby to give a preference to said defendants.

Dated New York, March 7th, 1905.

TAYLOR MORE,
Att'y for Plaintiff in Error.

JOHN BROOKS LEAVITT,
Of Counsel.

(Endorsed:) Assignment of Error.—Filed March 8, 1905.

By the Honorable Geo. C. Holt, one of the Judges of the District Court of the United States for the Southern District of New York, in the Second Circuit, to John M. Shaw and Alexander Davidson, Greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, on the 7th day of April, 1905, pursuant to a writ of error filed in the Clerk's office of the
67 District Court of the United States for the Southern District of New York, wherein Henry Arnold Richardson, as Trustee in Bankruptcy of J. Francis Brown, is plaintiff in error, and you

are defendant in error, to show cause, if any there be, why judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 8th day of March, in the year of our Lord one thousand nine hundred and five, and of the Independence of these United States the one hundred and twenty-ninth.

GEO. C. HOLT,
Judge of the District Court of the United States for the Southern District of New York.

(Endorsed:) United States Circuit Court of Appeals for the Second Circuit.—Henry Arnold Richardson, as Trustee in Bankruptcy of J. Francis Brown, Plaintiff in Error, *vs.* John M. Shaw and Alexander Davidson, Defendants in Error.—Citation.—Due service of a copy of the within citation is hereby admitted this 9th day of March, 1905.—Campbell & La Far, Attorneys for Defendants.—U. S. District Court, So. Dist. of N. Y.—Filed Mar. 13, 1903.

68 United States Circuit Court of Appeals for the Second Circuit, No. 205. October Term, 1905.

Argued April 10, 1906; Decided June 20, 1906.

HENRY ARNOLD RICHARDSON, as Trustee, etc., Plaintiff in Error,

vs.

JOHN M. SHAW and ALEXANDER DAVIDSON, Defendants in Error.

Error to the District Court of the United States for the Southern District of New York.

Before Judges Wallace, Townsend, and Coxe.

On writ of error to the Circuit Court for the Southern District of New York to review a judgment entered upon a verdict directed in favor of the defendants.

The action was brought by Henry Arnold Richardson, as trustee in bankruptcy of J. Francis Brown, to recover preferences received by the defendants in alleged violation of the provisions of the Bankruptcy Act.

Brown, the bankrupt, was a stock broker engaged in business at Boston, Mass.

In February, 1903, the defendants, who were copartners doing business as bankers and brokers in the city of New York, opened a speculative account with Brown for the purchase and sale of stocks on margin and deposited with him $500 for that purpose. The account was closed June 26, 1903, and during the five months of its

continuance the defendants, from time to time, paid other
69 moneys and transferred various securities, in lieu of money, as margins. The business was conducted in the usual manner, the broker buying and selling various stocks for his customers, charging them with the cost and crediting them with the proceeds of sales, the customers maintaining a margin of ten per cent. or more.

Upon the accounts rendered by Brown to the defendants was the following:

"It is understood and agreed that all securities carried in this account or deposited to secure the same may be carried in our general loans and may be sold or bought at public or private sale, without notice, when such sale or purchase is deemed necessary by us for our protection."

In pursuance of this agreement Brown pledged on his general loans all the securities deposited with him on the defendants' account and they, through their agent, were informed of the fact. When the account was closed, on June 25th, all of these securities had been pledged by Brown who for two months prior thereto had been insolvent.

The defendants' Boston agent, who had obtained knowledge of Brown's precarious financial condition, demanded and received payment of $5,000 on the 24th of June. On the following day he insisted on a final settlement and an account was made up showing the amount of securities to the credit of the defendants to be $45,583.75, and charges to the credit of Brown to be $34,919.62. The balance was $10,664.13.

This transaction is described in the complaint as follows:

"That on or about the 26th day of June, 1903, there was an accounting between the said defendants and said Brown of various dealing between them in which it was found that said defendants owed the said Brown the sum of thirty-four thousand nine
70 hundred and nineteen dollars and sixty-two cents ($34,-919.62) upon the payment of which said Brown was obligated to deliver to them certain securities or in default thereof to pay to them the amount of their then market value, to wit, the sum as they ascertained upon said accounting of forty-five thousand five hundred and eighty-three dollars and seventy-five cents ($45,583.75), and thereupon said defendants paid to said Brown said sum of thirty-four thousand nine hundred and nineteen dollars and sixty-two cents ($34,919.62), and said Brown then delivered to said defendants said securities, and the effect of such transfer will be to enable the said defendants as such creditors to obtain a greater percentage of their debt than any other creditors of said Brown of the same class."

The trial court decided that the defendants were not creditors and were entitled to their securities on paying the amount loaned thereon. The court held that the fundamental feature of the relation beween the parties was that Brown, the broker, had advanced or loaned money or credit and therefore was a creditor of the defendants, holding security for the amount which they owed him, and that on paying this amount the defendants were entitled to the security or their equity therein.

COXE, *Circuit Judge:*

The bankruptcy law provides that the word "'creditor' shall include anyone who owns a demand or claim provable in bankruptcy." (Section 1, subdiv. 9.) If, then, the defendants did not own such a claim it is manifest that they were not creditors preferred by the transactions of June 24th and 26th. In other words, the controversy turns upon the question whether or not the defendants were creditors of the bankrupt.

In 1869 the Court of Appeals of New York decided the case of Markham v. Jaudon (41 N. Y., 235).

Chief Judge Hunt, who wrote the prevailing opinion, states the agreement between the broker and his customer, their rela-
71 tions and mutual obligations, to be as follows:

"The broker undertakes and agrees—

"1. At once to buy for the customer the stocks indicated.

"2. To advance all the money required for the purchase, beyond the ten per cent. furnished by the customer.

"3. To carry or hold such stocks for the benefit of the customers so long as the margin of ten per cent. is kept good, or until notice is given by either party that the transaction must be closed. An appreciation in the value of the stocks is the gain of the customer, and not of the broker.

"4. At all times to have in his name or under his control, ready for delivery, the shares purchased, or an equal amount of other shares of the same stock.

"5. To deliver such shares to the customer when required by him, upon the receipt of the advances and commissions accruing to the broker; or

"6. To sell such shares upon the order of the customer, upon payment of the like sums to him, and account to the customer for the proceeds of such sale.

"Under this contract, the customer undertakes—

"1. To pay a margin of ten per cent. on the current market value of the shares.

"2. To keep good such margin according to the fluctuations of the market.

"3. To take the shares so purchased on his order, whenever required by the broker, and to pay the difference between the percentage advanced by him and the amount paid therefor by the broker."

72 He then reaches the conclusion that the contract was one of pledge and repudiates the theory that the transaction created an executory contract of sale. The customer purchased no stock of the broker; the broker sold nothing to the customer who acquired title to the stock and remained the general owner, entitled to redeem or to have the shares or their value delivered to him on paying the amount advanced by the broker with interest and commissions.

The customer could not be divested of his title to the stock except by sale upon reasonable notice or by judicial proceedings.

Two of the judges, Grover and Woodruff, dissented and presented

the view for which the plaintiff here contends with the well-known ability which distinguish the judgments of those eminent jurists. In their opinion such a transaction as is here shown was simply an executory agreement for speculation in the rise and fall of stocks which the broker, on condition of perfect indemnity against loss, agrees to carry through in his name, accounting to the customer for the profits and holding him responsible for the loss. The customer had no title to the stock, the contract contemplating that the stock should at all times remain in the broker. The customer's only remedy was an action for damages for breach of the contract; he had no action for conversion for the reason that he never had title to the stock. The eminence of the counsel who argued at the bar, the thorough discussion, which must have taken place in the consultation room, as evidenced by the three opinions delivered, and the fact that the principal question was for the first time presented to the court, make it apparent that the case was decided with mature deliberation and after every possible aspect of the controversy had been brought to the attention of the court.

From time to time persistent efforts have been made to induce the court to recede from or modify the doctrine of Markham *v.* Jaudon, but without avail. In its essential features it is the law to-day
73 not only of New York but of a large number of other states. Massachusetts alone has consistently rejected or, rather, has failed to give it full accord.

As late as 1902, in the case of Chase *v.* City of Boston, Chief Justice Holmes, now Mr. Justice Holmes, said:

"The petitioners contend that the necessary conclusion from the statement is that they held the stock as pledgees, the purchasers being the owners and pledgors, and, if this conclusion is not simply a matter of construction, that we ought to adopt the widely prevailing opinion that that is the relation of the parties in ordinary purchases upon margin, contrary to the view of the Massachusetts cases. Wood *v.* Hayes (15 Gray, 375); Covell *v.* Loud (135 Mass., 41). See Weston v. Jordan (168 Mass., 401, 404).

"We see no sufficient reason for departing from what has been understood to be the law of Massachusetts ever since the time of Chief Justice Shaw. No doubt, whichever view be taken, there will be anomalies, and no doubt it is possible to read into either a sufficient number of implied understandings to make it consistent with itself. * * * The English doctrine seems to be the same as that of this commonwealth, so that we are not left quite alone in a desert of logic. Bentinck *v.* London Joint Stock Bank (1893) (2 Ch., 120, 140, 141)." (180 Mass., 458.)

Here, then, are the two antagonistic views; the one holding that where a broker buys stock on a margin the title is in the customer for whom he buys; the other that it is in the broker.

Theoretically there is much to be said in favor of both contentions, but we see no valid reason to reject the New York doctrine, which has now become well-nigh universal in this country, for the other.

We are inclined to think that the logic of the situation is with the

prevailing doctrine. The title to stock purchased by a broker
74 is not suspended between earth and sky; it must be somewhere. In purchasing the stock the broker acts as the agent of the customer, and, if the transaction ended at this stage, there can be little doubt that the title would be in the customer; it is his, just as any other personal property is his which he buys and pays for.

Does not the actual transaction of buying on a margin recognize the ownership of the customer? Does he lose title to the stock because it remains with the broker as security for his advances? Is it not the customer's property that is so held and would the situation, in legal effect be different if the customer took up the stock and substituted stock or bonds actually owned by him?

As was said by the court in the Massachusetts case *supra:*

"Purchases on margin certainly retain some of the characteristics of ordinary single purchases by an agent, out of which they grew. The broker buys and is expected to buy stock from third persons to the amount of the order. Rothschild *v.* Brookman (5 Bligh [N. S.], 165; 2 Dow & Clark, 188). Taussig *v.* Hart (58 N. Y., 425). He charges his customer a commission. He credits him with dividends and charges him with assessments on stock. However the transaction is closed, the profit or loss is the customer's."

All this is inconsistent with the theory of ownership in the broker.

The New York cases are not absolutely controlling upon this court, but even if we had more doubt regarding it we should still deem it our duty to adhere to a rule which has been in force for nearly 40 years and which is understood and constantly recognized as a guide in the management of immense financial transactions. The situation is one where stability, uniformity and certainty are of supreme importance and the court should be absolutely sure of its position before vexing the financial center of the country with so serious a conflict of authority upon a question of commercial law.

75 We think, therefore, that the trial court was right in holding that the defendants were not creditors but debtors and when they paid what they owed they redeemed their stocks pledged with Brown.

Of course a different situation would have existed if Brown had disposed of the stock and had refused for that reason to deliver it on the defendants' demand.

It may be that such a refusal and subsequent acceptance by the defendants of other stock purchased by Brown, after his insolvency was known to them, would bring the case within the doctrine of Weston *v.* Jordan (168 Mass., 401).

The trial judge carefully considered this authority and, we think, properly distinguished it from the case at bar.

The payment of the $5,000 was not preferential and we deem it unnecessary to add anything to what was said by the trial judge on that subject.

The judgment is affirmed with costs.

John B. Leavitt, for the Plaintiff in Error.

A. Benedict, for the Defendants in Error.

76 At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 2nd day of July one thousand nine hundred and six.

Present: Hon William J. Wallace, Hon. William K. Townsend, Hon. Alfred C. Coxe, Circuit Judges.

HENRY ARNOLD RICHARDSON, as Trustee, Plaintiff in Error,
vs.
JOHN M. SHAW and ALEXANDER DAVIDSON, Defendants in Error.

Error to the Circuit Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said Circuit Court be and it hereby is affirmed with costs.

A. C. C.

It is further ordered that a Mandate issue to the said Circuit Court in accordance with this decree.

77 Endorsed: United States Circuit Court of Appeals, Second Circuit. H. A. Richardson *vs.* J. M. Shaw. Order for Mandate. United States Circuit Court of Appeals Second Circuit. Filed Jul- 7, 1906? William Parkin, Clerk

78 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 77 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Henry Arnold Richardson as Trustee, against John M. Shaw and Alexander Davidson, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 24th day of September in the year of our Lord One Thousand Nine Hundred and Six and of the Independence of the said United States the One Hundred and thirty-first.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

78½ Due and timely service of a copy of the within transcript of record is hereby admitted this 18th day of September 1906.

CAMPBELL & LA FAR,
Attorneys for Respondents.

79 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there in now pending before you a suit in which Henry Arnold Richardson, as Trustee in bankruptcy of J. Francis Brown, is plaintiff in error, and John M. Shaw and Alexander Davidson, are defendants in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court
80 of the United States, Do hereby command you that you send without delay to the said Supreme Court as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 16th day of October, in the year of our Lord one thousand nine hundred and six..

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

81 [Endorsed:] File No. 20,398. Supreme Court of the United States. No. 433, October Term, 1906. Henry Arnold Richardson, Trustee &c. *vs.* John M. Shaw and Alexander Davidson. Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Oct. 18 1906. William Parkin, Clerk.

82 United States Circuit Court of Appeals, Second Circuit.

HENRY ARNOLD RICHARDSON, as Trustee in Bankruptcy of J. Francis Brown, Plaintiff in Error,

vs.

JOHN M. SHAW and ALEXANDER DAVIDSON, Defendants in Error.

It is hereby stipulated and agreed between the attorneys for the respective parties hereto, that the certified transcript of record filed in the Supreme Court of the United States on the application for a writ of certiorari herein may be taken as a return to the writ, which was granted on October 15th, 1906, and that the certifying of another transcript of the record in pursuance of the writ may be dispensed with.

Dated, October 17th, 1906.

TAYLOR MORE,
Attorney for Plaintiff in Error.
CAMPBELL & LA FAR,
Attorneys for Defendants in Error.

Endorsed: U. S. Circuit Court of Appeals Second Circuit Henry Arnold Richardson as Trustee etc., Pl'ff in error, against John M. Shaw and Alexander Davidson, def'ts in error Stipulation. Taylor More, att'y for Pl'ff in error, 30 Broad Street, New York. United States Circuit Court of Appeals Second Circuit. Filed Oct. 18, 1906. William Parkin, Clerk.

83 To the Supreme Court of the United States, Greeting:—

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the Clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and hereby certified as a return to the writ of certiorari issued herein.

Dated New York October 18th, 1906.

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

84 [Endorsed:] 433–20398. United States Circuit Court of Appeals, Second Circuit. H. A. Richardson, as Trustee, etc., *v.* J. M. Shaw & Ano. Return to Writ of Certiorari.

85 [Endorsed:] File No. 20,398. Supreme Court U. S. October Term, 1907. Term No. 122. H. A. Richardson as Trustee &c., Petitioner *vs.* J. M. Shaw *et al.* Writ of Certiorari and return. Filed Oct. 20, 1906.